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In The

Supreme Court of the United States

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees,

and

DARRYL SINKFIELD, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees.

On Appeals From The United States District Court For The Middle District Of Alabama

APPENDIX TO JURISDICTIONAL STATEMENTS
Volume II, Pages 180a to 374a

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John **RICE** and Camilla L. **Rice**, etc., Plaintiffs,

v.

Hal **SMITH**, etc., et al., Defendants.

Civil Action No. 97-A-715-E.

United States District Court,
M.D. Alabama,
Eastern Division.

Dec. 19, 1997.

Kathleen A. Brown, Mark G. Montiel, Montgomery, AL, for John Rice and Camilla Rice.

John J. Park, Jr., Stanley E. Graham, Office of Attorney General, Montgomery, AL, Charles E. Grainger, Jr., Assistant Attorney General, Alabama Secretary of State's Office, Montgomery, Al, for Hal Smith and James Bennett.

James U. Blacksher, Birmingham, AL, Terry G. Davis, Terry G. Davis, P.C., Montgomery, AL, Solomon S. Seay, Jr., Montgomery, AL, Edward Still, Lawyers' Committee for Civil Rights Under Law, Director, Voting Rights Project, Washington, DC, for Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, Andrew Hayden and State of Alabama.

Before JOEL F. DUBINA, Circuit Judge, MYRON H. THOMPSON, Chief Judge, and W. HAROLD ALBRITTON, District Judge.

MEMORANDUM OPINION

MYRON H. THOMPSON, Chief Judge.

This three-judge court, which has been empaneled pursuant to 28 U.S.C.A. § 2284, is confronted with a

recently recurring issue: how a federal court confronted with a challenge to the apportionment of a State governing body should proceed when State courts have addressed, or appear poised to address, the challenge. This is also an important issue because it directly implicates federal-state relations.

In this lawsuit, plaintiffs John Rice and Camilla L. Rice (Rice plaintiffs) and plaintiffs Andrew Thompson, et al. (Thompson plaintiffs) challenge the apportionment plan of Alabama's State Legislature.[1] They claim that the plan impermissibly impinges in several ways on the equal protection clause of the fourteenth amendment: it violates the one person-one vote principle, it dilutes the voting strength of non-black voters, and it is a product of racial gerrymandering. The defendants are the Secretary of State of Alabama and the Probate Judge of Lee County, Alabama (State defendants), and the named representatives of a plaintiff class of African-American voters in a parallel State court proceeding (Sinkfield defendants). Jurisdiction is proper under 28 U.S.C.A. §§ 1331, 1343.

At oral argument on November 26, 1997, the Rice plaintiffs contended that we should stay this proceeding as to their claims because, although the State trial court has addressed the claims, the Alabama Supreme Court

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[1] Some of the defendants dispute whether the Thompson plaintiffs were properly added to this litigation. The Thompson plaintiffs were added to the Rice plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 15, rather than by intervening pursuant to Federal Rule of Civil Procedure 24. By referring to the Thompson plaintiffs as "plaintiffs," we should not be understood to have resolved this dispute in this memorandum opinion today.

has yet to hear their appeal. The Thompson plaintiffs contended that we should proceed ahead as to their claims because the claims were not part of the State court proceeding.

I.

Twice now, this federal court has been confronted with a challenge to Alabama's legislative plan for the State House and Senate. In 1992 and 1993, two groups of plaintiffs – a group of African-American plaintiffs and a group of Republicans – brought two lawsuits challenging legislative apportionment.[2] The federal court stayed and eventually dismissed the cases in favor of a State court consent decree.[3]

Four years later, in 1997, the Rice plaintiffs brought the current federal lawsuit, essentially challenging the apportionment plan adopted in the 1993 State court consent decree. We stayed our hand again, finding that it appeared that the State court which had entered the 1993

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[2] These two federal lawsuits are *Brooks v. Camp*, civil action no. 92-T-364-N (M.D.Ala.), and *Peters v. Folsom*, civil action no. 93-T- 124-N (M.D.Ala.).

[3] This court initially stayed the proceedings on the ground that the legislative process had not run its course. In the meantime, a state lawsuit was brought in which the court entered a consent decree adopting a reapportionment plan for the entire State legislature. *Sinkfield v. Bennett*, civil action no. 93-689-PR (Aug. 13, 1993). A question then arose as to whether the State court had authority to adopt the plan. We certified the question to the Alabama Supreme Court, which answered in the affirmative. *Brooks v. Hobbie*, 631 So.2d 883 (Ala.1993). We then dismissed the federal court proceedings.

consent decree was still available to consider the Rice plaintiffs' challenge. The Rice plaintiffs then presented their claims to the State court, which, after setting an aggressive trial schedule, found the claims to be without merit. The Rice plaintiffs have now appealed the State court judgment to the Alabama Supreme Court.[4]

In the meantime, and before the State court conducted its trial, the Rice plaintiffs amended their federal court complaint to add the Thompson plaintiffs as parties.[5]

As stated, the important issue for us is how to proceed on the Rice plaintiffs' and the Thompson plaintiffs' claims in light of the recent events in State court.

II.

A.

In *Growe v. Emison*, the United States Supreme Court held that federal judges are "required . . . to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." 507 U.S. 25, 33, 113 S.Ct. 1075, 1080, 122 L.Ed.2d 388 (1993) (emphasis in original). Federal judges are to "prefer[ ] both state branches to federal courts as agents of apportionment." *Id.* at 34, 113 S.Ct. at 1081 (emphasis in original). The Court based this holding on a doctrine – the abstention

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[4] State defendants' submission of documents filed in parallel State court proceedings, filed in this court December 11, 1997.

[5] Order, filed September 23, 1997.

doctrine – whose origins arise out of principles of federalism and reach back over half a century.[6] The Court explained that it has "required deferral, causing a federal court to 'sta[y] its hands,' when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case." *Id.* at 32, 113 S.Ct. at 1080 (quoting *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941)). It has allowed abstention "when the federal action raises difficult questions of state law bearing on important matters of state policy, or when federal jurisdiction has been invoked to restrain ongoing state criminal proceedings." *Id.* (citing *Colorado River Water*

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[6] Indeed, some commentators have rejected the singular use of an abstention doctrine: "[I]t is more precise to refer to 'abstention doctrines,' since there are several distinguishable lines of cases, involving different factual situations, different procedural consequences, different policy considerations, and different arguments for and against their validity." 17A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4241, at 25. We use the term "abstention" broadly to refer not only to the decision to "abstain" from hearing a plaintiff's claims, requiring dismissal, but also to the decision to "defer" to parallel state proceedings while staying the federal court litigation. Although the United States Supreme Court differentiated in *Growe*, 507 U.S. at 32 n. 1, 113 S.Ct. at 1080 n. 1, between abstention and deferral, the lower courts and other authorities have continued to use the term "abstention" to describe both actions. *See, e.g., Benavidez v. Eu*, 34 F.3d 825, 832-33 (9th Cir.1994) (distinguishing between "deferral abstention" and "dismissal abstention"); 17A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure (2d ed. Supp.1997) § 4241, at 1 ("to change the terminology now would be confusing rather than clarifying.").

Conservation Dist. v. United States, 424 U.S. 800, 814-817, 96 S.Ct. 1236, 1244-1246, 47 L.Ed.2d 483 (1976)).

However, abstention within the reapportionment context differs in an important respect from that in other contexts, for it marks a unique burden shift within the doctrine. In other contexts, a federal court's decision to decline to exercise jurisdiction is disfavored and thus exceptional. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, ___, 116 S.Ct. 1712, 1721, 135 L.Ed.2d 1 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244 ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.") (quoting *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188-189, 79 S.Ct. 1060, 1062-63, 3 L.Ed.2d 1163 (1959)). But in the reapportionment context, when parallel State proceedings exist, the decision to refrain from hearing the litigant's claims should be the routine course.

The rationale behind this distinction lies in the inherently greater interest a State has in legislative reapportionment. As the Court explained in *Growe*, "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." 507 U.S. at 34, 113 S.Ct. at 1081.

"Absent evidence," the Court continued, "that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id. See also Brooks v. Hobbie*, 631 So.2d 883, 889-90 (Ala.1993) ("Redistricting is both a sensitive and political issue. There is no dispute that the legislature has the initial responsibility to act in redistricting matters . . . However, in the event the legislature fails to act, the responsibility shifts to the state judiciary.") (citations omitted). The Court also focused on the more universal practical factor in favor of abstention, "the nature of the relief requested," *Growe*, 507 U.S. at 35, 113 S.Ct. at 1081, and observed that a State "can have only one set of legislative districts." *Id.*

B.

Relying on these principles, this court has twice deferred or stayed federal proceedings in favor of State court proceedings in which there was a challenge to Alabama's legislative apportionment. In 1993, when the federal court stayed and eventually dismissed the two original cases challenging State apportionment, it relied on *Growe*. And more recently, in the fall of 1997, when we stayed proceedings on the Rice plaintiffs' claims, we again expressly relied on *Growe*.

The Rice plaintiffs admit that we cannot consider their claims in the face of the State court decision on their claims. Relying on *Growe*, however, they ask that we stay, rather than dismiss, their claims. We cannot agree. Because the State court has adjudicated the merits of their

claims, both res judicata and the Rooker-Feldman doctrine preclude this court's review of that decision.[7] The Rice plaintiffs argue that because the Alabama Supreme Court could potentially fail to grant timely review of their appeal, this court should retain jurisdiction so as to provide them with a forum in which to obtain substantive review of the State court decision. Not only does this argument contravene the above-stated Rooker-Feldman doctrine – under which only the United States Supreme Court can entertain a proceeding to reverse or modify a State court judgment on the merits[8] – but the United States Supreme Court expressly rejected such an argument in *Growe*, when it wrote: "We fail to see the relevance of the speed of appellate review. [Precedent] requires only that the state agencies adopt a constitutional plan 'within ample time . . . to be utilized in the [upcoming] election . . . It does not require appellate review of the plan prior to the election.' " 507 U.S. at 35, 113 S.Ct. at 1081 (citations omitted). The Rice plaintiffs further note that the Alabama Supreme Court could reverse the State court decision and find that the State court was without jurisdiction from the start. This argument, however, is a compelling reason as to why the dismissal of the Rice plaintiffs' claims should be without prejudice, which we will do.

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[7] District courts are courts of original jurisdiction; only the Supreme Court can entertain a proceeding to reverse or modify a State court judgment on the merits. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

[8] *Id.*

With regard to the Thompson plaintiffs' claims, we believe we should again take our instructions from *Growe* and stay our hand. First, by ruling on the merits of the Rice plaintiffs' constitutional claims in a timely fashion, the State court has indicated not only its willingness to entertain challenges to Alabama's redistricting plan, but also its ability to resolve such claims in an exigent manner. The United States Supreme Court has made clear that, "Absent evidence that the[ ] state branches will timely fail to perform [the redistricting] duty," a federal court should not interject itself into the State's matter. *Growe*, 507 U.S. at 34, 113 S.Ct. at 1081. While it is true that the Thompson plaintiffs have not had their claims resolved by the State court, we are convinced that the State court is willing or able to hear such claims. Indeed, the State court offered the Thompson plaintiffs an opportunity to intervene in the Rice plaintiffs' proceedings, but the Thompson plaintiffs declined to do so. We know of no reason why the State court would not still entertain the Thompson plaintiffs' claims.[9]

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[9] In the order entered on August 14, 1997, we not only "stayed" our hand, we "directed" the Rice plaintiffs to intervene in the State court proceedings. The Rice plaintiffs have taken issue with whether the State court proceeding was in a posture that warranted our stay and whether we had the authority to issue a directive to a party as to what to do in another proceeding. Whether our earlier decision was premature or authorized is an issue we need no longer reach because the Rice plaintiffs did intervene and the State court has now ruled on their claims. Moreover, since our order of August 14, 1997, the calculus has changed to make *Growe* deferral clearly appropriate. As stated, the State court has not only reaffirmed jurisdiction over the State legislative plan, it has entertained

Second, the State defendants stated at oral argument, without refutation from the Thompson plaintiffs, that a decision by us in favor of the Thompson plaintiffs would probably impact the remainder of the plan, including the part addressed by the State court recently. Alabama "can have only one set of legislative districts." *Growe*, 507 U.S. at 35, 113 S.Ct. at 1081.

Third and finally, having participated in the creation of the reapportionment plan and having recently heard evidence as to the constitutionality of the plan, the State court is far better equipped to handle the Thompson plaintiffs' claims, as well as those of any future litigant interested in the outcome of the proceedings. This factor reinforces the conclusion that we should defer to the State court.[10]

An appropriate judgment will be entered.

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and resolved claims almost identical to those now asserted by the Thompson plaintiffs.

[10] In *Growe*, the United States Supreme Court stated that federal courts are required "to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." 507 U.S. at 33, 113 S.Ct. at 1080 (emphasis in original and added). At oral argument, the Sinkfield defendants suggested that, under a logical extension of *Growe*, a federal court is required to abstain in favor of State courts even if there is no pending or ongoing State court proceeding. Before being eligible for relief in federal court, according to the Sinkfield defendants, a federal plaintiff must be able to show that he or she first sought relief in State court and the State court failed to entertain his or her claim at all or in a timely manner. We do not reach this issue.

ORDER

In accordance with the memorandum opinion entered on this date, it is the ORDER, JUDGMENT, and DECREE of the court:

1. The claims of plaintiffs John and Camilla L. Rice are dismissed without prejudice;

2. This case is stayed as to the claims of plaintiffs Andrew Thompson, et al.

It is further ORDERED that the following motions are denied as moot: the Rice plaintiffs' motion for class certification, filed May 2, 1997; the Rice plaintiffs' motion for a preliminary injunction, filed May 2, 1997; the Rice plaintiff's motion for reconsideration of this court's order of August 14, 1997, filed August 28, 1997; the Rice plaintiffs' motion to dismiss the Sinkfield defendants, filed October 24, 1997; the Rice plaintiffs' motion to amend and supplement the complaint, filed October 24, 1997; the Rice plaintiffs' motion to compel discovery requests and for sanctions, filed November 11, 1997; the Rice plaintiffs' request to schedule an evidentiary hearing, filed November 25, 1997; the Sinkfield defendants' motions to dismiss and/or motions for judgment on the pleadings, filed July 10, 1997, October 9, 1997, October 27, 1997, November 25, 1997. It is further ORDERED that the Sinkfield defendants' motion for leave to withdraw their second motion to dismiss, filed September 23, 1997, is granted.

It is further ORDERED that the disposition of the following motions are stayed pursuant to the general stay issued today: the State defendants' motion for an order to show cause why the Sinkfield defendants should not be dismissed, filed November 10, 1997; the State defendants'

motion for summary judgment, filed November 25, 1997; the Permanent Legislative Committee's motion to intervene as defendants, filed November 7, 1997.

ALBRITTON, District Judge, concurring.

I write in concurrence to clarify my view of the limited nature of our action in this case, and to avoid future citation of our opinion as precedent for propositions which are not intended.

The Sinkfield defendants have asked the court throughout the course of this litigation to hold that a party who wishes to challenge the constitutionality of a state's legislative apportionment or congressional districting must first take the case to a state court as a prerequisite to a federal action. In their proposed scheme, only when the state court fails to act expeditiously may the claim then be brought to federal court. While footnote 10 of the majority opinion correctly states that we do not reach this issue, I believe that the footnote, without more explanation, might lend more credence to the Sinkfield's proposition than is due. I would only defer to an existing state court proceeding. I would not abstain because the Plaintiff had not first filed suit in state court.

In *Growe* the Supreme Court said:

> In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the state, through its legislative or judicial branch, has begun to address that highly political task itself.

Growe, 507 U.S. at 33, 113 S.Ct. at 1080 (emphasis in original).

Deferring to the state's legislature is quite different from requiring a party to first seek relief in a state court when there is no ongoing case. There is only one legislature, and it has the primary responsibility for apportionment and districting.[1] Only in the absence of legislative action does the judicial branch come in, and then the question arises as to which state court will act.[2]

Growe requires deferral only when the state "has begun to address" the issue. Deferral to the legislative

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[1] Of course, giving the legislature primary responsibility for districting is not required by any federal law or Constitutional provision. A state may choose another method. Indeed many states have chosen such a method in an attempt to depoliticize (as much as possible) the duty of districting. *See* Jeffrey C. Kubin, The Case for Redistricting Commissions, 75 Tex. L.Rev. 837 (1997) (discussing 17 states which have adopted redistricting commissions, and the various forms that those commissions may take). Apparently the idea of a redistricting commission is being considered in Alabama's neighboring state of Florida. *See* George L. Waas, The Process and Politics of Legislative Reapportionment and Redistricting under the Florida Constitution, 18 Nova L.Rev. 1001, 1034-35 (1994).

[2] At least one state apparently uses a specialized three-judge court, similar to this three-judge court, when a court must redistrict or reapportion. *See Growe*, 507 U.S. at 28, 113 S.Ct. at 1077 (referencing fact that "Minnesota Supreme Court appointed a Special Redistricting Panel (composed of one appellate judge and two district judges) to preside over the case."). A specialized court may avoid duplicative litigation at the state level, and could also avoid the resentment that sometimes arises when a judge elected by a single circuit's voters takes action which affects the entire state.

branch can be justified even if no proposed legislation is pending at the time, because of the legislature's continuing duty in this area, and because of the legislature's freedom to act on any issue at any time. This is not so with the judicial branch, which generally cannot act unless someone first files the appropriate suit in some court. This makes *Growe's* requirement of deferral to a branch of state government which "has begun" to address the issue highly significant when applied to the judicial branch. There is simply no way that the state judicial branch can be said to "ha[ve] begun" to act unless there is a pending case in a state court which has jurisdiction over the issue.

This court's action in this case, therefore, should not be taken to suggest in any way that a person who wishes to raise a constitutional challenge to congressional and legislative districts must first file a new lawsuit in some state court. We have deferred to a state court which "has begun to address" the issue of the constitutionality of state legislative districts under the 1990 census. That is the issue which was before the state court, and that court has held that it retained jurisdiction of the case to enforce its judgment.[3]

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[3] Florida state courts apparently dealt with the problem of multiple suits throughout the state by having the state supreme court retain jurisdiction. *See* In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session; Constitutionality Vel Non, 414 So.2d 1040, 1052 (1982) ("we retain exclusive state jurisdiction to consider any and all future proceeding [sic] relating to the validity of this apportionment plan").

The Plaintiffs argue that deferral is not appropriate in this case because it is the state court's redistricting plan itself that they challenge as being unconstitutional. There was no appeal from the state court in 1993 because there was a consent decree. The Plaintiffs say that the parties in state court consented to an unconstitutional plan and that they, as non-parties to the consent decree, should be able to challenge the plan now in federal court.

I agree with the Plaintiffs that *Growe* does not prohibit this court from considering their challenge, and we have not held that it does. We have found it to be prudent, and in furtherance of the concept of federalism, however, to defer under the particular circumstances of this case. Those circumstances are that the state court adopted the challenged plan before the Supreme Court enunciated new legal principles to be applied in reapportionment cases, specifically in what has been referred to as "race-based" districting. *See Abrams v. Johnson*, ___ U.S. ___, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); *Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Miller v. Johnson*, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *United States v. Hays*, 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995); and *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). This court determined that because of that, it would be preferable for the state court to have an opportunity to review its plan in light of the new Supreme Court decisions, with appellate review available in the Alabama Supreme Court, and possibly the Supreme Court of the United States.

The Rice Plaintiffs intervened in the state court, at our direction. They now say that we were without authority to direct that intervention. Be that as it may, no motion for reconsideration was filed here before the intervention, and the state court has acted. Since we are dismissing the claims of the Rice plaintiffs, they are free to seek appellate review of our decision to defer.

The Thompson Plaintiffs are free to intervene in the state court case to seek determination there of the constitutionality of the plan as it relates to their districts, with appellate review available if necessary. If the state court is unable or unwilling to entertain their claims, or if the Alabama Supreme Court should hold in the Rice appeal that the Circuit Court of Montgomery County did not have jurisdiction over the Rice claims, then I would be prepared to let the case proceed in this court, subject, of course, to consideration of pending motions and defenses, including the defense of laches.

I wish to emphasize that it is only because (1) a state court has held that it has retained jurisdiction over the state legislative reapportionment plan based on the 1990 census, and (2) very substantial changes were made by the Supreme Court of the United States in the law governing legislative reapportionment after that plan was adopted, that I agree to defer to the state trial court, with the possibility of appellate review of its decision. In the absence of either of those facts, I would have favored hearing the constitutional attack on the consent decree entered by the state court. I do not believe that this

court's decision should be viewed as going beyond that, and, therefore,

I concur.

John RICE and Camilla L. Rice

v.

Darryl SINKFIELD, et al.

1970449.

Supreme Court of Alabama.

Dec. 18, 1998.

Rehearing Dismissed April 1, 1999.

Mark G. Montiel and Kathleen A. Brown of Mark G. Montiel, P.C., Montgomery, for appellants.

James U. Blacksher, Birmingham; Terry G. Davis, Montgomery; Solomon S. Seay, Jr., Montgomery; and Edward Still, Lawyers' Committee for Civil Rights, Washington, D.C., for appellee Darryl Sinkfield et al.

Bill Pryor, atty. gen., and John J. Park, Jr., and Charles E. Grainger, Jr., asst. attys. gen., for appellee Secretary of State James Bennett.

PER CURIAM.

The plaintiffs, John Rice and Camilla L. Rice, appeal from the Montgomery Circuit Court's order upholding a 1993 consent judgment that adopted the "Reed-Buskey" redistricting plan. The plan, which was approved as part of the redistricting process due to follow the 1990 census, created eight new majority-black House districts and three new majority-black Senate districts. The Alabama House of Representatives approved the plan, but the Senate did not. The plan was precleared by the Justice Department and it is now in effect.

Four years after the adoption of the Reed-Buskey plan, the Rices challenged the 1993 consent judgment on

constitutional grounds. They specifically argued that the legislative districts in which they live were created through racial gerrymandering and that the votes of white voters in those districts had been diluted.

The plaintiffs' request for modification of the 1993 consent judgment – which is based on the 1990 federal census – is moot because it would not affect future legislative elections. *See City of Birmingham v. Southern Bell Tel. & Tel. Co.*, 234 Ala. 526, 529, 176 So. 301, 303 (1937) (" '[I]t is not within the province of appellate courts to decide abstract, hypothetical, or moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow.' ") (quoting 4 C.J.S., *Appeal and Error*, § 40, pp. 117-18). The next legislative election is scheduled for the year 2002. *See* Ala.Code 1975, § 17-2-3 (providing that state legislators will be elected every four years beginning in 1978). By that time, the report of the 2000 federal census is scheduled to be released, and we must assume that the Legislature will timely fulfill its constitutional duty to redraw legislative districts based on that census. *See* 13 U.S.C. § 141(c) (1988) (providing that the Bureau of the Census should forward its decennial census results to the states not later than April 1, 2001); Ala. Const.1901, §§ 198 – 200 (providing that the state Legislature will redraw election districts in the next session after the taking of each decennial census); *Opinion of the Justices No. 269*, 384 So.2d 1051, 1052 (Ala.1980) (stating that this Court must assume that the Legislature acts in a manner consistent with the Constitution) (citing *Board of Revenue & Road Comm'rs v. Puckett*, 227 Ala. 374, 149 So. 850 (1933)). Thus, we must conclude that the elections held in 2002 and subsequent

years will be governed not by the current consent judgment, but by a new districting plan that is based on the 2000 federal census. Because we must assume that any potential modification of the current consent judgment based on the 1990 census would not affect the outcome of the 2002 legislative election or any successive legislative election, we must conclude that an effort by this Court to render the relief sought by the plaintiffs would not be effective.[1]

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[1] The Supreme Court of the United States has recognized several exceptions to the federal doctrine of mootness that are applicable to cases involving: (1) class actions where some members of the class still have a live case or controversy; (2) wrongs capable of repetition, yet evading review; (3) continuing collateral consequences to a party; and (4) voluntary cessation of injurious activity by a party who is free to resume it. *See Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (holding that mootness of the class representative's particular claim did not render the entire class action moot as long as other members of the class continued to have a live controversy); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969) (holding that plaintiffs' challenge to state election law was not moot, even after the challenged election was completed, because the plaintiffs could challenge the law with respect to future elections, so that the basis of their claim might be "capable of repetition, yet evading review"); *Sibron v. New York*, 392 U.S. 40, 53-58, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (holding that a challenge to the seizure of evidence, brought by defendants who had already completed their jail sentences, was not moot, because the defendants could still suffer adverse "collateral consequences" arising from their criminal records); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) (holding that the Government's antitrust challenge to the defendant corporations' practice of using interlocking boards of directors was not rendered moot by the defendants' voluntarily ceasing the practice, because the

Therefore, this appeal is dismissed as moot.

APPEAL DISMISSED AS MOOT.

HOOPER, C.J., and MADDOX, HOUSTON, KENNEDY, COOK, SEE, and LYONS, JJ., concur.

ALMON, J., concurs in the result.

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defendants were free to resume that practice at any time). The rationales underlying these exceptions are not applicable to this case.

Andrew D. THOMPSON, et al., Plaintiffs,
v.
Hal SMITH, etc., et al., Defendants.

No. Civ.A. 97-A-715-E.

United States District Court,
M.D. Alabama,
Eastern Division.

July 2, 1999.

David R. Boyd, Balch & Bingham, Montgomery, AL, for movant represented by Boyd.

Stanley E. Graham, Waller, Lansden, Dortch & Davis, Nashville, TN, for defendant represented by Graham.

Jeffrey G. Hunter, Montiel & Brown, P.C., Montgomery, AL, for plaintiff represented by Hunter.

Jordan Dorman Walker, Jr., Balch & Bingham, Montgomery, AL, for movant represented by Walker.

Before JOEL F. DUBINA, Circuit Judge, W. HAROLD ALBRITTON, Chief District Judge, and MYRON H. THOMPSON, District Judge.

MEMORANDUM OPINION

MYRON H. THOMPSON, District Judge.

The question before this three-judge federal court, empaneled pursuant to 28 U.S.C.A. § 2284, is whether claims brought by a group of voters who are challenging a state legislative districting plan are barred by an earlier final judgment in a state lawsuit in which two other voters challenged the same plan. For the reasons that

follow, we hold, on motions for summary judgment, that this federal lawsuit is barred in part only.

I. SUMMARY-JUDGMENT STANDARD

The summary-judgment standard applicable here almost needs no repeating. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Once the party seeking summary judgment has informed the court of the basis for its motion, the burden shifts to the nonmoving party to demonstrate why summary judgment would be inappropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *see also Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-17 (11th Cir.1993) (discussing how the responsibilities on the movant and the nonmovant vary depending on whether the legal issues, as to which the facts in question pertain, are ones on which the movant or nonmovant bears the burden of proof at trial). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

II. BACKGROUND

This federal litigation has a long and complex history involving two lawsuits in different fora. The first is a state lawsuit in the Circuit Court of Montgomery County,

Alabama, that resulted in a consent judgment approving a redistricting plan for the Alabama House of Representatives and Senate.[1] The second is this federal lawsuit in which certain Alabama voters now seek to challenge the state-court redistricting plan on grounds of vote dilution, violation of the one-person-one-vote principle, and race-based gerrymandering.

There are four groups involved in these cases. First, there are the Rice plaintiffs, two white persons who initiated the federal lawsuit.[2] Second, there are the Thompson plaintiffs, a group of white persons whom the Rice plaintiffs later added to their complaint.[3] Third, there are the state defendants one of whom was also a defendant in the state lawsuit.[4] And, lastly, there are the Sinkfield parties, a group of African-Americans who were successful plaintiffs in the state lawsuit and were later named as defendants in this federal suit.[5]

The sequence of events leading up to the current dispute is as follows.

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[1] *See Sinkfield. v. Camp*, CV-93-689-PR, slip op. (Ala.Cir.Ct. Aug. 13, 1993).

[2] The Rice plaintiffs are: John Rice and Camilla L. Rice.

[3] The Thompson plaintiffs are: Andrew D. Thompson, Peggy C. Kelly, Gonzalo F. Montiel, Ann G. Hunter, Daniel P. Brown, W. Ricardo Montiel, Karen D. Outlaw, Kelly Brasher, and Bibb Gunter.

[4] The state defendants are: Hal Smith, probate judge of Lee County, James Bennett, Secretary of State of Alabama, and the State of Alabama. The defendant in the state lawsuit was James Bennett, in his official capacity as Secretary of State of Alabama.

[5] The Sinkfield parties are: Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, and Andrew Hayden.

August 13, 1993: The state court entered a consent judgment between the Sinkfield parties and the Secretary of State of Alabama approving a redistricting plan for the Alabama legislature.

May 2, 1997: The Rice plaintiffs filed this federal lawsuit challenging the state-court plan on the following three grounds: vote-dilution, violation of the one-person-one-vote principle, and race-based gerrymandering.

August 14, 1997: This court, relying on *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), directed the Rice plaintiffs to intervene in the state lawsuit. They did so on August 28, 1997.

August 29 and September 9, 1997: After intervening in the state lawsuit, the Rice plaintiffs moved to amend their federal complaint to add the Thompson plaintiffs as parties. The Thompson plaintiffs (with the exception of Andrew D. Thompson) reside in different legislative districts from the Rice plaintiffs. In the amendments, the Thompson plaintiffs essentially adopted the Rice plaintiffs' claims of vote-dilution, violation of the one-person-one-vote principle, and race-based gerrymandering.

October 15, 1997: This court granted the Rice plaintiffs' motions to amend, and the Thompson plaintiffs were added as parties.

October 17, 1997: The state court invited the Thompson plaintiffs to intervene in the state-court action, but they refused.

November 20, 1997: After hearing the merits, the state court dismissed the Rice plaintiffs' claims. The state

court found that their one-person-one-vote and vote-dilution claims lacked merit and that there was no evidence that race was a predominant factor in the redistricting process sufficient to support their race-based gerrymandering claim.

December 19, 1997: The Rice plaintiffs turned again to this federal court, and, in light of the state-court judgment, we dismissed their complaint without prejudice on the basis of res judicata and the Rooker-Feldman doctrine.[6] *See Rice v. Smith*, 988 F.Supp. 1437, 1440 (M.D.Ala.1997) (three-judge court). Relying on *Growe v. Emison*, we also stayed the Thompson plaintiffs' claims in order to provide them with another opportunity to file their claims in state court. *See id.* at 1441.

December 18, 1998: The Rice plaintiffs appealed the state-court decision, and, on this date, the Alabama Supreme Court dismissed their appeal as "moot." *Rice v. Sinkfield*, 732 So.2d 993 (Ala.1998) (per curiam). The court reasoned that, because the "next legislative election is scheduled for the year 2002," and because "[b]y that time, the report of the 2000 federal census is scheduled to be released, . . . the elections held in 2002 and subsequent years will be governed not by the current consent judgment, but by a new districting plan that is based on the 2000 federal census." *Id.*

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[6] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 1314-15, 75 L.Ed.2d 206 (1983).

January 27, 1999: This federal court required that the parties show cause as to why this federal lawsuit should not be dismissed in light of the decision of the Alabama Supreme Court.

February 5, 1999: The Thompson plaintiffs responded by asking that this court proceed with their claims.

April 30, 1999: This federal court treated as motions for summary judgment certain motions to dismiss and for judgment on the pleadings, filed earlier by the state defendants and the Sinkfield parties, and the court set the motions for briefing. These summary-judgment motions are now before us.

III. DISCUSSION

The motions for summary judgment present two issues: first, whether the Thompson plaintiffs should be barred from further pursuit of their claims in this federal court because they failed to take advantage of the opportunity we gave them to pursue those claims in state court; and, second, whether the Thompson plaintiffs' claims are barred by the state-court judgment based on the principle of res judicata.

A. Deferral

In the order entered December 19, 1997, relying on *Growe v. Emison*, we deferred to the on-going state lawsuit, stayed our hand until the state court system had fully addressed the claims being pursued by the Rice plaintiffs, and suggested that, in the meantime, the

Thompson plaintiffs should seek intervention in that lawsuit to present their claims. *See Rice*, 988 F.Supp. at 1440. The Thompson plaintiffs have now returned to this court, contending that, because the Alabama Supreme Court has held that it is too late to afford redress for the upcoming legislative elections, the Alabama courts are now closed to them and they should now be allowed to proceed in this court. The state defendants and the Sinkfield parties respond that the Thompson plaintiffs should be barred from further pursuit in this case because they failed to intervene in the state lawsuit. We agree with the Thompson plaintiffs.

Admittedly, we earlier deferred to the state court because the state-court proceeding was still on-going and "the State court [was] willing or able to hear such claims." *Id.* at 1440. However, this circumstance no longer obtains. As the Thompson plaintiffs correctly point out, the Alabama Supreme Court has held that their claims are moot, and, as a result, the Alabama courts are now essentially closed to them. With these changed circumstances, there is no longer a state proceeding to which to defer.[7]

We also cannot accept the contention of the state defendants and the Sinkfield parties that the Thompson

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[7] A closer reading of *Growe v. Emison* could lead to the conclusion that a federal court is required to defer to the state court's remedial efforts only, not to the state-court proceeding altogether. In this instance, of course, we deferred to the entire state-court proceeding. We need not resolve whether deferral should have been limited to the state court's remedial efforts only.

plaintiffs, by not intervening in the state lawsuit, essentially defaulted on their claims in this court. The United States Supreme Court in *Growe* made clear that federal courts and state courts have concurrent jurisdiction to entertain challenges to redistricting plans and that, as a result, both courts are open to such claims. *See* 507 U.S. at 32, 113 S.Ct. at 1080. *Growe* stands only for the proposition that the federal court must 'defer' to any state-court redistricting effort; it does not say that the federal court must dismiss its own proceedings. *See id.* at 32 n. 1, 113 S.Ct. at 1080 n. 1. Indeed, in *Growe*, the Supreme Court acknowledged that, after the state court had completed its proceeding, the federal court later rightfully took up the remaining claim under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C.A. § 1973, *see* 507 U.S. at 38-39, 113 S.Ct. at 1083; *Growe* did not require that the plaintiffs there pursue their § 2 claim in state court as well.

Similarly, here, now that the Alabama courts have completed their involvement in the legislative redistricting, this court can take up the Thompson plaintiffs' claims – subject, of course, to any res judicata and other defenses that may follow from the state judgment. *See id.* at 35-36, 113 S.Ct. at 1082 (federal court, under principles of federalism and comity embodied in Full Faith and Credit Act, 28 U.S.C.A. § 1738, required to give "legal effect" to state redistricting judgment).

B. Res Judicata

We therefore now turn to the question whether the judgment obtained by the Rice plaintiffs in state court

bars the Thompson plaintiffs' claims in this court. A federal court must give preclusive effect to state-court decisions "whenever the court of the State from which the judgment emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); *see also Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525, 106 S.Ct. 768, 772, 88 L.Ed.2d 877 (1986). The court must therefore look to Alabama law to determine whether an Alabama state court would give preclusive effect to the state-court decision.

"Under Alabama law, the essential elements of res judicata are: '(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits.' If all of these elements are met, any claim that was or could have been adjudicated in the previous action is precluded. If even one element of the four is not met, however, res judicata is not applicable." *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1560 (11th Cir.1990) (citations omitted).[8]

Although the Alabama Supreme Court dismissed the appeal from the state-court judgment as moot, the first requirement, a prior judgment on the merits, is still met

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[8] Res judicata is usually raised as an affirmative defense in the answer to a complaint. *See* Fed.R.Civ.P. 8(c). However, "[a]lthough Rule 8(c) includes res judicata and collateral estoppel on the list of affirmative defenses that must be pleaded specifically by answer, these defenses may be raised for the first time on a motion for summary judgment." *Kachler v. Taylor*, 849 F.Supp. 1503, 1515 (M.D.Ala.1994) (Thompson, J.). Here, the opportunity of raising either defense was unavailable until the state court had rendered its decision.

because the appellate court did not vacate the state-court judgment and thus that judgment is still valid. *See, e.g., Gross v. QMS, Inc.*, 669 So.2d 839, 840 (Ala.1995); *Masonry Arts, Inc. v. Mobile County Comm'n*, 628 So.2d 334, 335 (Ala.1993); *Arrington v. State ex rel. Parsons*, 422 So.2d 759, 760 (Ala.1982). It is also undisputed that the second requirement, a court of competent jurisdiction, is met. Therefore, the two remaining questions are whether there is a substantial identity of parties and whether the same causes of action were presented.

1. Identity of Parties

Alabama law defines 'identity of the parties' broadly – as broadly as due process allows. *See Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n*, 401 So.2d 764, 770 (Ala.1981). The key inquiry is whether the interests of the party against whom res judicata is asserted were adequately represented by a party to the prior lawsuit. *See id.* When the party against whom res judicata is asserted was not itself a party to the prior lawsuit, however, the court must undertake a further inquiry to determine whether the application of res judicata would offend the due process guarantees of the fourteenth amendment to the United States Constitution. *See Richards v. Jefferson County*, 517 U.S. 793, 797 n. 4, 116 S.Ct. 1761, 1765 n. 4, 135 L.Ed.2d 76 (1996).

There is little doubt that in state court the Rice plaintiffs adequately represented the interests now asserted by the Thompson plaintiffs here. The Thompson plaintiffs did not enter this lawsuit as intervenors seeking to assert a separate interest in the subject matter of this law suit,

see Fed.R.Civ.P. 24 (intervention), but instead were joined as parties by amendment of the Rice plaintiffs' complaint, *see* Fed.R.Civ.P. 15 (amendment), Fed.R.Civ.P. 20 (permissive joinder of parties). Together with the Rice plaintiffs, they sought to be designated as representatives of all non-black Alabama voters. The Rice plaintiffs sought the same designation in state court, and all of the Thompson plaintiffs are members of this putative class. The Thompson plaintiffs thus cannot be characterized as strangers to the state-court action and are more properly characterized as alter-egos of the Rice plaintiffs with identical or closely-aligned interests. Accordingly, we conclude that the Thompson plaintiffs were adequately represented in state court by the Rice plaintiffs. *See Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.) (subsequent suit by a non-party may be precluded "if one of the parties to the suit is so closely aligned with [the non-party's] interests as to be his virtual representative"), cert. denied, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).

The court's inquiry cannot end here, however, because the United States Supreme Court in *Richards* made clear that there is a due-process component to res judicata as well. In that case, the Supreme Court held that, as a matter of federal due process, prior taxpayer litigation challenging an occupation t[illegible] in Jefferson County, Alabama, could not bind a different group of Alabama taxpayers challenging the same tax even though the courts below had found adequate representation under Alabama law. The Court observed that the party against whom res judicata had been asserted had received no notice of the prior suit and had been given no

opportunity to be heard. *See Richards*, 517 U.S. at 799, 116 S.Ct. at 1766 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). The Court further observed that the plaintiffs in the prior litigation did not purport to sue on behalf of a class, and the Court found no reason to suppose that the earlier court took care to protect the interests of the unrepresented parties. In other words, *Richards* suggests that some of the concerns that should inform a court in its due-process analysis include whether the plaintiffs in the prior litigation purported to sue on behalf of a class that includes the plaintiff against whom res judicata is asserted, whether there was "full and fair consideration of the common issue," *id.* at 801, 116 S.Ct. at 1767, whether the non-party had been informed that the original lawsuit is pending, *id.* at 799, 116 S.Ct. at 1766; and whether the non-party could "choose for himself whether to appear or default, acquiesce or contest." *Id.*

This case, therefore, presents a situation entirely different from that in *Richards*. The state court invited the Thompson plaintiffs to participate in the prior suit, and this court twice suggested that they do the same.[9] The Thompson plaintiffs thus had notice of the state litigation and were given ample opportunity to be heard. The Rice plaintiffs, moreover, expressly sought to represent a class that clearly includes the Thompson plaintiffs, and there is

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[9] This court also ordered the Rice plaintiffs to file with the court all pleadings and other documents they filed in the state-court action, together with all orders issued by the state court. *See* order entered September 23, 1997. The Thompson plaintiffs were thus kept fully abreast of the state-court proceeding.

every reason to conclude that the state court took care to protect the interests of non-party class members. The Thompson plaintiffs were fully aware of these class claims and yet did nothing. Under these circumstances, the court cannot conclude that it would offend due process to bind the Thompson plaintiffs to the prior litigation, and we turn next to the issue of whether the same causes of actions were present.

2. Same Causes of Action

To determine whether two lawsuits present the same causes of action, Alabama courts apply a test "that in certain respects is similar to, but which is not the same as, the 'same transaction' test" in the Restatement (Second) of Judgments. *Equity Resources Management, Inc. v. Vinson*, 723 So.2d 634, 637 (Ala.1998). Because there is no mathematically precise definition for when there is an identity of causes of action, the test for making such determination has many formulations, but the principal inquiries are essentially two: (1) whether the claims 'arise out of' the same evidence, wrongful acts or disputes, *see id.* at 637, 638, or present the same issues (in particular, factual ones), *see, e.g., Selma Foundry & Supply Co. v. Peoples Bank & Trust Co.*, 598 So.2d 844, 848 (Ala.1992); and (2) whether the claims would be subject to proof by the same evidence, *Vinson*, 723 So.2d at 637. Also probative, but not determinative, is "the identity [of] or differences in the forms of the two actions." *Id.* at 638.

a. Vote-Dilution and One-Person-One-Vote Claims

Upon their addition as parties to the case, the Thompson plaintiffs simply adopted the Rice plaintiffs' one-person-one-vote and vote-dilution claims by reference to the Rice plaintiffs' complaint. Because the Rice plaintiffs repeated these claims verbatim in their state-court complaint, the Thompson plaintiffs' one-person-one-vote and vote-dilution claims before this court are identical in form to the Rice plaintiffs' one-person-one-vote and vote-dilution claims presented in state court.

The one-person-one-vote claims in both state and federal court allege that the state's current redistricting plan violates the equal-protection principles articulated in *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506 (1964), in that the plan as a whole fails to establish population equality within constitutionally acceptable percentage variations. The claims in both cases arise out of the formation of the state's current redistricting plan, present identical issues of fact, and are subject to proof by the same plan-wide evidence of population disparities and other factors considered by the state court; in other words, the plaintiffs in both state and federal court would arguably prove their claim by showing that a district anywhere in the State exceeded the permissible relative variations in population size. The claims are therefore identical in substance and present the same causes of action for purposes of res judicata.

The vote-dilution claims in state and federal court allege that the defendants intentionally underpopulated

the majority-black districts and overpopulated the majority-white districts in the current redistricting plan for the purpose of diluting white voting strength in violation of the equal protection clause of the fourteenth amendment. Like the one-person-one-vote claims, the vote-dilution claims in both cases arise out of the formation of the state's current redistricting plan. The vote-dilution claims, however, would require proof of racial motivation. The vote-dilution claims would nevertheless be subject to the same proof in federal court as they were in state court and are identical in substance for purposes of res judicata; in other words, the plaintiffs in both state and federal court would arguably prove their claim by showing that a district any where in the State had been intentionally created with an underpopulated black majority so as to dilute white voting strength.

b. Race-Based Gerrymandering Claim

Each of the Thompson plaintiffs alleges that the House and Senate district in which he or she lives was racially gerrymandered in violation of the equal protection clause of the fourteenth amendment. Only Andrew Thompson, however, challenges a district named in the Rice plaintiffs' state-court complaint, and, in response to a motion by the state defendants, the state court expressly limited the Rice plaintiffs' gerrymandering claim to the districts in which the Rice plaintiffs reside: House Districts 79 and 83 and Senate Districts 27 and 28. The other Thompson plaintiffs live in districts outside of

those addressed by the state court, and their gerrymandering claims could not have been asserted by the Rice plaintiffs for lack of standing.[10]

Andrew Thompson claims that the State has adopted a plan which, on the basis of race, gerrymanders Senate District 28 and House District 82. Thompson thus raises the same issue as to his Senate district – whether Senate District 28 was racially gerrymandered – raised by the Rice plaintiffs in state court. The other Thompson plaintiffs, by contrast, raise issues specific to the districts in which they live and which were not raised in the state-court proceeding, as does Thompson in regard to House District 82.

Furthermore, the evidence that would be required to establish a race-based gerrymandering claim is necessarily district-specific. A plaintiff must show either (1) that the district in which he or she lives "has no rational explanation except as an effort to separate voters on the basis of race," or (2) that, in redrawing the district, "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness,

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[10] Voters entitled to pursue a gerrymandering claim are limited to those who reside within the racially gerrymandered district or those who can show by "specific evidence" that they suffer the "special harms" associated with "personally be[ing] subjected to a racial classification" under the redistricting plan. *United States v. Hays*, 515 U.S. 737, 744- 45, 115 S.Ct. 2431, 2436, 132 L.Ed.2d 635 (1995); *see also Bush v. Vera*, 517 U.S. 952, 957-58, 116 S.Ct. 1941, 1951, 135 L.Ed.2d 248 (1996) (plurality opinion). The district-specific nature of a gerrymandering claim is in contrast to the plan-wide nature of a vote-dilution or one-person-one-vote claim.

contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 903, 916, 115 S.Ct. 2475, 2482, 2488, 132 L.Ed.2d 762 (1995); *see also Bush v. Vera*, 517 U.S. 952, 959, 116 S.Ct. 1941, 1952, 135 L.Ed.2d 248 (1996); *Shaw v. Reno*, 509 U.S. 630, 644, 113 S.Ct. 2816, 2825, 125 L.Ed.2d 511 (1993). Different evidence would therefore be required to establish the Thompson plaintiffs' gerrymandering claims, save that of Andrew Thompson's Senate claim, than was required in state court to prove the Rice plaintiffs' claims.

Although the state court did examine how the plan as a whole was drafted, it focused primarily on the manner in which the drafters drew House Districts 79 and 83 and Senate Districts 27 and 28. Indeed, there is little that Andrew Thompson could add to the evidence presented by the Rice plaintiffs on Senate District 28. As to House District 82 and for the other Thompson plaintiffs, though, the evidence presented in state court would largely not address their claim.

The court must therefore conclude that only Andrew Thompson's race-based gerrymandering claim for Senate District 28 presents the same cause of action presented by the Rice plaintiffs in state court.

In conclusion, we hold that the motions for summary judgment filed by the state defendants and the Sinkfield parties should be granted as to the vote-dilution and one-person-one-vote claims of all the Thompson plaintiffs and as to Andrew Thompson's race-based gerrymandering challenge to Senate District 28, and otherwise denied. An appropriate order will be entered.

ORDER

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that the motions for summary judgment filed by the state defendants on March 17, 1999 (Doc. no.129), and the Sinkfield parties on March 17, 1999 (Doc. no. 131), are granted to the extent that the following claims are dismissed: (1) the vote-dilution and one-person-one-vote claims of all the Thompson plaintiffs; and (2) plaintiff Andrew D. Thompson's race-based gerrymandering challenge to Senate District 28. This case will proceed as to all remaining claims and unaddressed defenses.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. 97-A-715-E
v.	)	
HAL SMITH, etc., et al.,	)	
Defendants.	)	

Before EMMETT R. COX, Circuit Judge, W. HAROLD ALBRITTON, Chief District Judge, and MYRON H. THOMPSON, District Judge.

THOMPSON, District Judge.

OPINION

(Filed Dec. 30, 1999)

This three-judge court will now take up the motions for summary judgment with respect to plaintiff Peggy C. Kelley's challenges to Alabama House District 88 (HD 88), filed by the state defendants[1] and by the Sinkfield defendants.[2] Kelley is one of a group of eight plaintiffs, all white Alabama voters, who filed this lawsuit to challenge their state legislative voting districts on the grounds that the districts were racially gerrymandered in violation of the equal protection clause of the fourteenth

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[1] Filed October 13, 1999 (Doc. no. 205).

[2] Filed October 25, 1999 (Doc. no. 219).

amendment. The plaintiffs named two groups of defendants: the state defendants, Alabama Secretary of State James Bennett and Lee County Probate Judge Hal Smith, both sued in their official capacities; and the Sinkfield defendants, a group of black voters who achieved the current legislative districting plan as part of a consent decree in a previous lawsuit which they filed in state court.

Both groups of defendants moved for summary judgment in their favor as to Kelley's claims regarding HD 88. We heard oral argument on the summary judgment motions on December 17, 1999, and entered an order granting summary judgment on HD 88 on December 20, 1999.[3] We now give the reasons for that order.

I.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Where, as in this case, the non-moving party bears the burden of proof on an issue at trial, "the moving party, in order to prevail, must do one of two things: show that the non-moving party has no evidence to support its case, or present 'affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial.' " *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en

[3] Entered December 20, 1999 (Doc. no. 288).

banc)). Once the party seeking summary judgment has informed the court of the basis for its motion, the burden shifts to the non-moving party to demonstrate why summary judgment would be inappropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

II.

This case has a long and complex history, which we set forth at length in our opinion of July 2, 1999, reported at 52 F. Supp.2d 1364 (M.D. Ala. 1999), and which we will therefore not recount here. Rather, we shall focus our attention on the particular claims raised by Kelley with regard to HD 88.

Kelley is a resident of HD 88, whose population is 79.59% white and 19.71% black. HD 88 comprises all of Autauga County and a small part of Elmore County, including all of the town of Prattville and part of Millbrook. The part of Millbrook not included in HD 88 lies within House District 75 (HD 75).

Kelley's claim that HD 88 was racially gerrymandered focuses to a large extent on the division of the town of Millbrook between HD 88 and HD 75. She argues that Millbrook and Prattville together constitute a community of interest, and therefore, under traditional districting principles, should have been placed in the same district.

The division of Millbrook, Kelley adds, does not contribute to the compactness or contiguity of HD 88. Since the Millbrook/Prattville community was thus "needlessly" divided, Kelley concludes that the only possible reason for drawing HD 88 in this way is race.

Both the state defendants and the Sinkfield defendants have moved for summary judgment on Kelley's claims against HD 88, arguing that Kelley has not provided evidence to support essential elements of her claims.

III.

The United States Supreme Court first recognized a cause of action under the equal protection clause of the fourteenth amendment for claims of racial gerrymandering in *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816 (1993). Courts analyze these types of claims in two steps. First, a court determines whether to apply the strict scrutiny afforded to classifications based on race, by examining whether the challenged districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts based on race." *Id.* at 649, 113 S.Ct. at 2828. The Supreme Court further explained the requirements for satisfaction of this element in *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 2488 (1995), stating that strict scrutiny should be applied only where race is the "predominant factor" in the drawing of district lines. Plaintiffs may prove that race was predominant through evidence that "the legislature subordinated traditional

race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Once the court has determined that strict scrutiny is appropriate, it proceeds to the second step of *Shaw* analysis: consideration of whether the district lines were narrowly tailored to further a compelling state interest. *Shaw*, 509 U.S. at 658, 113 S.Ct. at 2832.

The defendants in this case focus their arguments on the first element of Kelley's *Shaw* claim. They contend that she has provided no evidence indicating that race was a factor in drawing the boundaries of HD 88, and that the district lines are therefore not subject to any equal protection analysis, much less strict scrutiny. To support this contention, the defendants point to evidence of the racial composition of HD 88 and its neighboring districts. Since Kelley argues that the division of Millbrook between HD 88 and HD 75 demonstrates that race was the underlying motive of the legislature, the defendants have offered evidence to show that this division had no impact on the racial composition of either district. Both HD 88 and HD 75 are predominantly white: HD 88 is 79.59% white, and HD 75 is 78.26% white.[4] Demographic evidence also indicates that Millbrook was not divided along racial lines. The part of Millbrook that lies within HD 88 is 75.80% white, and the part that lies

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[4] *See* State Defendants' Memo, filed Oct. 13, 1999, at 9 (Doc. no. 206).

within HD 75 is 83.23% white.[5] Where the evidence clearly demonstrates that the drawing of district lines did not have the effect of classifying individuals by race, or by any other impermissible category for that matter, the equal protection clause is not implicated.

Despite the overwhelming evidence that the division of Millbrook had no racial effect, Kelley attempts to demonstrate that race was a motivating factor through the testimony of Dr. Joe Reed, one of the central negotiators of the current districting plan. Dr. Reed has openly stated that his role in this process was to represent the interests of black voters, and that his primary goal was to increase black representation in the Alabama legislature. However, Kelley has produced no specific evidence that Dr. Reed had race-based motivations for drawing the line between HD 88 and HD 75. General evidence about Dr. Reed's goals in drawing the state-wide districting plan as a whole is not sufficient to show that HD88 in particular was drawn for racial reasons.

Finally, Kelley implies that the division of the town of Millbrook is unlawful because defendants have not proven that it was necessary. Kelley states in her brief that Millbrook was "needlessly divided" and that "[t]here was no one person-one vote necessity to divide Millbrook, Alabama."[6] However, whether the drawing of district lines was necessary to achieve one goal or another

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[5] *See* Response of Plaintiff Kelley, filed Nov. 4, 1999, at 7-8 (Doc. no. 235).

[6] *Id.* at 6-8.

has no bearing on Kelley's equal protection claim. Legislators may consider a wide variety of factors in drawing district lines, and they are at liberty to prioritize among these in whatever fashion they choose, so long as they do not rely primarily on an impermissible factor such as race. In cases such as this one, where the evidence demonstrates clearly that race played no role in the drawing of district lines, the State is by no means obliged to demonstrate that the choices it made were necessary to preserve communities of interest or to achieve any other constitutionally permissible goal.

IV.

For the above reasons, we concluded in our order of December 20, 1999, that summary judgment should be entered in favor of the defendants on Kelley's claims regarding HD 88.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,	)	
Paintiffs,	)	CIVIL ACTION NO. 97-A-715-E
v.	)	
HAL SMITH, etc., et al.,	)	
Defendants.	)	

Before EMMETT R. COX, Circuit Judge, W. HAROLD ALBRITTON, Chief District Judge, and MYRON H. THOMPSON, District Judge.

THOMPSON, District Judge.

OPINION

(Filed Jan. 3, 2000)

This three-judge court will now take up the motions for summary judgment with respect to plaintiff Andrew D. Thompson's challenges to Alabama House District 82 (HD 82), filed by the state defendants[1] and by the Sinkfield defendants.[2] Thompson is one of a group of eight plaintiffs, all white Alabama voters, who filed this lawsuit to challenge their state legislative voting districts on the grounds that the districts were racially gerrymandered in violation of the equal protection clause of the fourteenth amendment. The plaintiffs named two groups

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[1] Filed October 6, 1999 (Doc. no. 198).

[2] Filed October 25, 1999 (Doc. no. 214)

of defendants: the state defendants, Alabama Secretary of State James Bennett and Lee County Probate Judge Hal Smith, both sued in their official capacities; and the Sinkfield defendants, a group of black voters who achieved the current legislative districting plan as part of a consent decree in a previous lawsuit, which they filed in state court.

Both groups of defendants moved for summary judgment in their favor as to Thompson's claims regarding HD 82. We heard oral argument on the summary judgment motions on December 17, 1999, and entered an order granting summary judgment on HD 82 on December 20, 1999.[3] We now give the reasons for that order.

I.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Where, as in this case, the non-moving party bears the burden of proof on an issue at trial, "the moving party, in order to prevail, must do one of two things: show that the non-moving party has no evidence to support its case, or present 'affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial.' " *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc)). Once the party seeking summary judgment has

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[3] Entered December 20, 1999 (Doc. no. 289).

informed the court of the basis for its motion, the burden shifts to the non-moving party to demonstrate why summary judgment would be inappropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

II.

This case has a long and complex history, which we set forth at length in our opinion of July 2, 1999, reported at 52 F. Supp.2d 1364 (M.D. Ala. 1999), and which we will therefore not recount here. Rather, we shall focus our attention on the particular claims raised by Thompson with regard to HD 82.

Andrew Thompson resides in Shorter, Alabama, a town in Macon County and in HD 82, which comprises all of Macon and Bullock Counties, as well as a small part of Lee County. According to 1990 census figures, HD 82 is 79.73% black and 19.81% white. The total population of HD 82 is 38,257, including 24,928 Macon County residents, 11,042 Bullock County residents, and 2,287 persons residing in Lee County.

Because the Macon and Bullock County portions of HD 82 simply follow county borders, Thompson's claim of racial gerrymandering focuses on the inclusion of a portion of Lee County in HD 82. His claim rests in large part on what he contends is the bizarre shape of this piece of Lee County, which one of plaintiff's experts calls

"a robot-arm extension," and describes as "appear[ing] to jump over Auburn to reach the northwest portion of Opelika."[4] Because, according to Thompson, this area unnecessarily defeats both the compactness of HD 82 and the preservation of communities of interest in Lee County, he maintains that racial considerations are the only possible reason for drawing what he considers such a bizarrely shaped district.

Both the state defendants and the Sinkfield defendants have moved for summary judgment on Thompson's claims against HD 82, arguing that Thompson has not provided evidence to support an essential element of his claim, and producing additional evidence to suggest that Thompson could not succeed in proving that HD 82 was impermissibly racially gerrymandered.

III.

The United States Supreme Court first recognized a cause of action under the equal protection clause of the fourteenth amendment for claims of racial gerrymandering in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993). Courts analyze these types of claims in two steps. First, a court determines whether to apply the strict scrutiny afforded to classifications based on race, by examining whether the challenged districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts based on race." *Id.* at 649, 113 S. Ct. at

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[4] Plaintiffs' Response in Opposition to State Defendants' Motion, filed Oct. 28, 1999, at 9 (Doc. no. 225).

2828. The Supreme Court further explained the requirements for satisfaction of this element in *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488 (1995), stating that strict scrutiny should be applied only where race is the "predominant factor" in the drawing of district lines. Plaintiffs may prove that race was predominant through evidence that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Once the court has determined that strict scrutiny is appropriate, it proceeds to the second step of *Shaw* analysis: consideration of whether the district lines were narrowly tailored to further a compelling state interest. *Shaw*, 509 U.S. at 658, 113 S. Ct. at 2832.

The defendants in this case focus their arguments on the first element of Thompson's *Shaw* claim. They contend that Thompson's evidence does not support the conclusion that race was a factor in drawing the boundaries of HD 82, and they have produced additional evidence demonstrating that race could not have been a predominant factor in the drawing of HD 82. The defendants therefore argue that HD 82's boundaries are not subject to any equal protection analysis, much less strict scrutiny. We agree.

First, the shape of HD 82, which forms the cornerstone of Thompson's claim, is not bizarre enough to support on its own a conclusion of racial gerrymandering. The Supreme Court did state in *Shaw v. Reno* that "[i]n some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be

understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." 509 U.S. at 646-47, 113 S. Ct. at 2826. However, HD 82 is not such an exceptional case, especially as compared with the district challenged in. *Shaw v. Reno,* which passed through ten counties and "winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas," 509 U.S. at 635, 113 S. Ct. at 2821, or with the Texas districts challenged in *Bush v. Vera,* one of which was described as having "many narrow corridors, wings, or fingers." 517 U.S. 952, 973, 116 S. Ct. 1941, 1959 (1996). Though. the somewhat irregular shape of HD 82 can be considered by the court as evidence of the alleged racial gerrymandering, on its own it is not sufficient to create a genuine issue of fact and to defeat the motions for summary judgment.

In addition to the evidence of HD 82's shape, Thompson relies on evidence provided by two expert witnesses. Neither expert's testimony supports Thompson's claim that HD 82 was racially gerrymandered, however. The first expert, Dr. Ron W. Weber, makes several conclusory statements indicating that "race was a predominant factor" in the drawing of a long list of legislative districts in Alabama, but he does not provide any specific evidence suggesting that racial considerations predominated in the creation of HD 82 in particular.[5]

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[5] Plaintiffs' Response in Opposition to State Defendants' Motion, filed Oct. 28, 1999, at 7 (Doc. no. 225).

Thompson's second expert, Dr. William Stewart, is equally unhelpful to his claim. The main thrust of Stewart's report appears to be that HD 82 must have been racially gerrymandered in violation of the constitution, because no evidence suggests that its particular shape was otherwise necessary.[6] However, whether the drawing of district lines was necessary to achieve one goal or another has no bearing on Thompson's equal protection claim. Redistrictors may consider a wide variety of factors in drawing district lines, and they are at liberty to prioritize among these in whatever fashion they choose, so long as they do not rely primarily on an impermissible factor such as race. In order to defeat a claim of racial gerrymandering, the State is by no means obliged to demonstrate that the choices made were necessary to preserve communities of interest or to achieve compactness or any other constitutionally permissible goal.

Finally, Thompson attempts to demonstrate that race was a motivating factor in the drawing of HD 82 through the testimony of Dr. Joe Reed one of the central negotiators of the current districting plan. Dr. Reed has openly stated that his role in this process was to represent the interests of black voters, and that his primary goal was to increase black representation in the Alabama legislature. However, Thompson has produced no specific evidence that Dr. Reed had race-based motivations in drawing the boundaries of HD 82. General evidence about Dr. Reed's goals in drawing the state-wide districting plan as a

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[6] *Id.* at 8-9 ("Towns, cities, and other definable communities of interest generally have been split unnecessarily and without any compelling justification for doing so.")

whole is not sufficient to show that HD82 in particular was drawn for racial reasons.

In addition to demonstrating that Thompson's evidence is insufficient to make out a cognizable claim of unconstitutional racial gerrymandering, the defendants have presented evidence demonstrating that race was not the predominant factor in drawing HD 82. First, defendants have shown that the inclusion of part of Lee county in HD 82 was necessary to achieve as close as possible to the ideal population in the district as a whole. The 1990 census indicated that the ideal population for an Alabama house district was 38,482; because only 35,970 people reside in Macon and Bullock Counties combined, the adopted plan added 2,287 people from Lee County to raise the total population of HD 82 to 38, 257.[7]

The defendants have also produced demographic evidence indicating that the race of those Lee county residents who were added to HD 82 did not significantly impact the racial composition of the district as a whole. Mason and Bullock Counties standing alone, without the part of Lee County that was added, are 81.53% black. With the addition of 2,287 Lee County residents, HD 82 is now 79.73% black; in other words, the addition of part of Lee County to HD 82 changed the black majority in the district by only 1.8%. Even more defeating to Thompson's claim is the fact that the effect of adding part of Lee County to HD 82 was to dilute rather than to strengthen the black population of HD 82. Though Thompson has

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[7] Memorandum in Support of Motion for Summary Judgment in Favor of State Defendants, filed Oct. 6, 1999, at 10 (Doc. No. 199).

never asserted the specific basis for his Shaw claim, we assume, since he resides in a majority-black district. that he believes HD 82 was gerrymandered to be predominantly black. If his primary argument supporting this claim is that an ill-formed finger was carved out of Lee county and appended to his otherwise compact district, then his claim falls flat when the evidence shows that the finger actually made his district less rather than more predominantly black.

Indeed, demographic evidence also demonstrates that, even if every one of the Lee County residents that was added on to HD 82 were white, the black majority in the district as a whole would only have been reduced by 3%[8] Any way that the State made up for Macon and Bullock Counties' population deficit, HD 82 would still have been predominantly black. Thompson's claim that the addition of part of Lee county to HD 82 is evidence of racial gerrymandering therefore has no merit.

IV.

For the above reasons, we concluded in our order of December 20, 1999, that summary judgment should be entered in favor of the defendants on Thompson's claims regarding HD 82.

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[8] Sinkfield Defendants' Consolidated Brief, filed Oct. 25, 1999, at 6 (Doc. no. 223).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

ANDREW D. THOMPSON, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. 97-A-715-E
v.	)	
HAL SMITH, etc., et al.,	)	
Defendants.	)	

Before EMMETT R. COX, Circuit Judge, W. HAROLD ALBRITTON, Chief District Judge, and MYRON H. THOMPSON, District Judge. ALBRITTON, Chief District Judge.

MEMORANDUM OPINION

(Filed Jan. 6, 2000)

I. INTRODUCTION

This three judge court will now take up the motions for summary judgment with respect to Plaintiff Daniel Brown's challenges to Alabama House District 73 (HD73), filed by the state defendants[1] and by the Sinkfield defendants.[2] Brown is one of a group of eight plaintiffs, all white Alabama voters, who filed this lawsuit to challenge their state legislative voting districts on the ground that the districts were racially gerrymandered in violation of

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[1] Filed October 25, 1999 (Doc. # 211).

[2] Filed October 25, 1999 (Doc. # 217).

the equal protection clause of the fourteenth amendment. The plaintiffs named two groups of defendants: the state defendants, Alabama Secretary of State James Bennett and Lee County Probate Judge Hal Smith, both sued in their official capacities; and the Sinkfield defendants, a group of black voters who achieved the current legislative districting plan as part of a consent decree in a previous lawsuit, which they filed in state court.

Both groups of defendants moved for summary judgment in their favor as to Brown's claims regarding HD 73. We heard oral argument on the summary judgment motions on December 17, 1999. For the reasons discussed below, the motions are due to be GRANTED.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Where, as in this case, the non-moving party bears the burden of proof on an issue at trial, "the moving party, in order to prevail, must do one of two things: show that the non-moving party has no evidence to support its case, or present 'affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial.'" *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc)). Once the party seeking summary judgment has informed the court of the basis for its motion, the burden

shifts to the non-moving party to demonstrate why summary judgment would be inappropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the, nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Cow.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

III. FACTS

This case has a long and complex history, which we set forth at length in our opinion of July 2, 1999, reported at 52 F. Supp.2d 1364 (M.D. Ala. 1999), and which we will therefore not recount here. Rather, we shall focus our attention on the particular claims raised by Brown with regard to HD 73.

Daniel Brown resides at 3409 North Water Mill Road, in the Carriage Hill subdivision in the City of Montgomery, which is part of HD 73. House District 73 lies entirely within the city limits of Montgomery. According to 1990 census figures, HD 73 is 10.52% black and 88.15% white. The total population of HD 73 is 40,396.

Brown's claim that HD 73 was racially gerrymandered focuses primarily on the belief that the district is "too white." *See* Brown Depo. at 14:14-17. According to Brown, the voting districts of Alabama should be racially integrated like the schools were integrated to better reflect the communities. *See id.* at 69:23-70:10. Both the state defendants and the Sinkfield defendants have moved for summary judgment on Brown's claims against

HD 73, arguing that Brown has not provided evidence to support an essential element of his claim.

IV. DISCUSSION

The United States Supreme Court first recognized a cause of action under the equal protection clause of the fourteenth amendment for claims of racial gerrymandering in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993). Courts analyze these types of claims in two steps. First, a court determines whether to apply the strict scrutiny afforded to classifications based on race, by examining whether the challenged districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts based on race." *Id.* at 649, 113 S. Ct. at 2828. The Supreme Court further explained the requirements for satisfaction of this element in *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488 (1995), stating that strict scrutiny should be applied only where race is the "predominant factor" in the drawing of district lines. Plaintiffs may prove that race was predominant through evidence that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Once the court has determined that strict scrutiny is appropriate, it proceeds to the second step of *Shaw* analysis: consideration of whether the district lines were narrowly tailored to further a compelling state interest. *Shaw*, 509 U.S. at 658, 113 S. Ct. at 2832.

The defendants in this case focus their arguments on the first element of Brown's *Shaw* claim. They contend that Brown's evidence does not support the conclusion that race was a factor in drawing the boundaries of HD 73. The defendants therefore argue that HD 73's boundaries are not subject to any equal protection analysis, much less strict scrutiny. We agree.

First, Brown relies on the evidence provided by two expert witnesses to support his claim that HD 73 was racially gerrymandered.[3] Neither expert's testimony supports Brown's claim that HD 73 was racially gerrymandered, however. The first expert, Dr. Ron W. Weber, makes several conclusory statements indicating that "race was a predominant factor" in the drawing of a long list of legislative districts in Alabama, but he does not provide any specific evidence suggesting that racial considerations predominated in the creation of HD 73 in particular.[4]

Brown's second expert, Dr. William Stewart. provides little support for Brown's claim against HD 73. Dr. Stewart points only to the fact that areas with a minority population of more than 65% were "shut out" of the district to support his theory that "[b]lacks appear to have been deliberately excluded from House District

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[3] *See* Corrected Thompson Plaintiffs' Consolidated Response in Opposition to Sinkfield Defendants' Motions for Summary Judgment and State Defendants' Motions for Partial Summary Judgment filed on November 22, 1999, at 39 (Doc. # 248).

[4] *See* Exh. E, at 17-18.

73."[5] Dr. Stewart does not specify specific "black" areas that were excluded from HD 73, nor does he address the implications that adding such people to the district would have on the total population of the district. HD 73 has a population of 40,936, 4.97% above the ideal population for a house district in Alabama. Adding additional people to the district may likely violate the one person, one vote requirements of the Constitution and may also undermine the traditional districting factor of compactness. Dr. Stewart only makes a generalized conclusion about the population of HD 73, without designating specific areas that were excluded or discussing specific areas that could be removed from HD 73 if areas with higher black populations were added, to comport with the traditional districting factors of compactness and keeping communities of interest together. Therefore, this report provides little specific support to Brown's claim that HD 73 was gerrymandered.

In addition to the expert reports, Brown makes two arguments regarding the population composition of his district. First, Brown argues that HD 73 is "too white." *See* Brown Depo. at 14:16. He doesn't believe that his district reflects his neighborhood, where he shops or where he goes to church. *See id.* at 14:22-15:8 & 25:16-18. Brown asserts that certain blocks of black voters were left out of his district, making the district more white. *See id.* at 25:20-22.

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[5] Stewart Report at 6. Exh. D to Plaintiffs' Response in Opposition to State Defendants' Motion for Summary Judgment Against Plaintiff Andrew D. Thompson, Jr., filed on October 28, 1999 (Doc. #225).

The defendants offer evidence to illustrate that the dividing lines of HD 73 under the Reed-Buskey Plan had little impact on the racial composition of HD 73. HD 73 was going to be a majority white district no matter how the lines were drawn using traditional districting principles. For example, under the Pokey Plan, HD 73 was 88.14% majority white.[6] The Reed-Buskey Plan changed it to 88.15% white. Consequently, merely because HD 73 is "too white" does not illustrate that race was a predominant factor in the drawing of the district. The Shaw majority has recognized that the "racial composition of a particular voting district, without more," is not enough to support a claim for a violation of the equal protection clause of the fourteenth amendment. *Hays*, 515 U.S. at 746.

Brown's second population argument is that HD 73, and all other house districts for that matter, should be integrated like the school system was integrated. *See* Brown Depo. 69:2370:10. Brown believes that neither whites nor blacks can negotiate for districts. *See id.* at 74:17-75:17. Further, when asked who should construct the districts, Brown stated, "Somebody much smarter than us. Like the courts did in terms of integration and that kind of stuff like that." *See id.*

The *Shaw* majority specifically rejects this "integration" argument, however. In *Hays*, the appellees urged the court to consider their district, "a 'segregated' voting

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[6] *See* Exh. 52 filed on December 15, 1999 (Doc. #283). Plaintiff's counsel described the Pokey Plan at the Hearing held on December 17, 1999, as "the 1983 district with the 1990 census information." Hearing Transcript, December 17, 1999, at 123:13.

district, and thus, that their position [was] no different from that of a student in a segregated school district." *Hays*, 515 U.S. at 746. The Court found, however, that "an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment." *Id.* Consequently, this court also rejects Brown's "integration" argument.

Finally, Brown attempts to demonstrate that race was a motivating factor in the drawing of HD73 through the testimony of Dr. Joe Reed, a central negotiator of the current plan. Dr. Reed has openly stated that his role in the districting process was to represent the interests of black voters, and that his primary goal was to increase black representation in the Alabama legislature. However, Brown has produced no specific evidence that Dr. Reed had race-based motivations in drawing the boundaries of HD 73. General evidence about Dr. Reed's goals in drawing the state-wide districting plan as a whole is not sufficient to show that HD 73 in particular was drawn for racial reasons.

In addition to their other evidence, the defendants have presented evidence that race was not the predominant factor in drawing HD 73. First, defendants have produced evidence to show that HD 73 comports with the traditional factor of compactness. HD 73 is among the most compact districts in terms of perimeter and dispersion. HD 73 is the fifth most compact district in terms of perimeter out of the 105 districts and it ranks 37th out of the 105 districts in terms of dispersion. The defendants have also presented evidence that HD 73 reflects incumbent preferences. Perry Hooper, Jr. was the incumbent representative of HD73. Representative Hooper testified

in his deposition that he didn't have any problem with the way his district was drawn under the Reed-Buskey plan and that "the lines virtually were very similar to the way they were in 1983." *See* Hooper Depo. 30:14-15. Hooper asked Dr. Reed to keep his district similar to the way it was. *See id.* at 73:3-4.

V. CONCLUSION

For the above reasons, it is hereby ORDERED that summary judgment should be GRANTED in favor of the defendants on Brown's claims regarding HD 73. A separate order will be entered in accordance with this Memorandum Opinion.

Expert Witness Report
Thompson et al. v. Smith, CA 97-A-715-E
David A. Bositis
October 8, 1999

INTRODUCTION. I have been asked by James Blacksher of Birmingham, Alabama (representing the Sinkfield parties) to examine the organization and activities of the Alabama Democratic Conference, the New South Coalition, and the Jefferson County Citizens Coalition and to assess whether these organizations are functionally equivalent to political parties. Mr. Blacksher has provided me with copies of depositions from Joe Reed and Jerome Gray of the Alabama Democratic Conference, Richard Arrington of the Jefferson County Citizens Coalition, Henry Sanders of the Alabama New South Coalition, and John Rice, one of the plaintiff intervenors in the Sinkfield action. Mr. Blacksher also requested that in examining these organizations from the perspective of political parties that I also address issues of democracy and representation that are tied to political parties.

I am a political scientist and long-time scholar of political parties and I have conducted research and published extensively in that area. I am also a nationally recognized scholar of black politics, and am presently senior political analyst at the Joint Center for Political and Economic Studies, a nonpartisan research institution in Washington, DC that specializes in black studies. Finally, I am also regarded as a voting rights scholar, and I have been an expert witness in two federal voting rights cases, *Hays v. Louisiana* and *Johnson v. Mortham*.

POLITICAL PARTIES AND DEMOCRACY.

Political party theorists are in agreement that political parties and party competition are essential to democracy. In E.E. Schattschneider's words "Political parties created democracy . . . modern democracy is unthinkable except in terms of parties"[1] While there are several areas of disagreement among political party theorists, this perspective (regarding parties and democracy) represents a consensus view.

PARTY SYSTEMS.

Political parties function within party systems. Party systems are based in durable patterns of interactions and conflict between social groups, and include at least two political parties as units which compete against each other in electoral and governing institutions and result in predictable consequences and behavior among party leaders.

In terms of the state legislature, Alabama appears to have had what might be termed a modified one-party system at the time of the 1990s reapportionment. In 1992, 78.1 percent (82 of 105) of the members of the Alabama House were Democrats, and 80 percent (28 of 35) of the members of the Alabama State Senate were Democrats.[2] In consequence, much of the significant political conflict transpired within the Democratic party. Often in one-

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[1] E.E. Schattschneider (1942) *Party Government*. New York: Farrah and Rinehart.

[2] **SOURCE:** The National Conference of State Legislators.

party states, intra-party competition is based on factions. This was not the case in Alabama. Factions are shifting groups of competing elites who are not linked to popular followings. The competition that took place in the Alabama legislature and within the Alabama Democratic party was between functional political parties. The social groups' (represented by the Alabama Democratic Conference, the New South Coalition, and the Jefferson County Citizens' Coalition[3]) politically salient interactions – including conflict – with the other 'Democratic' parties (as well as with the Republicans) in the legislature are part of a durable and long-term pattern. This pattern includes competition in elections and government, and is associated with generally predictable consequences among party leaders. Rather than a one-party system in the Alabama legislature, there was a situation more closely approximating a *multi-party* system.

POLITICAL PARTIES.

A political party exhibits a structure or organization; links leaders to a popular following, which includes generating an in-group perspectives and having symbols of party identification among leaders and followers; and it

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[3] From the depositions of the leaders of these three organizations, it is clear that while functioning as political parties, they each do so within a circumscribed geographical area. The Alabama Democratic Conference is a statewide organization (save one county), The Jefferson County Citizens' Coalition functions primarily in Jefferson County, and the Alabama New South Coalition functions in approximately 20 counties.

contests elections, and seeks offices and power in government[4].

In the American context, political parties are *cadre* parties as opposed to *mass* parties.[5] Cadre parties have a relatively small leadership group (or cadre) and also usually a somewhat larger – but still small – number of activists, who are usually volunteers. Near election time, the number of people active in party affairs swells, only to recede once the election is over. Mass political parties, typified by European Socialist parties, have large, relatively permanent (or long-term) memberships. Members pay dues, are given membership cards, and engage in party activities on a year-round basis.

The two largest American parties, the Democratic party and the Republican party, have official party organizations at the national, state, and local level. The relationships between the different organizational levels are generally *stratarchical*,[6] that is, power is not completely top-down, as in a bureaucracy, but rather it is based on a *reciprocal deference structure* in which leaders at all levels act independently but also defer to each other. There are matters that occasionally, but rarely, arise where higher level organizations demand acquiescence from lower level organizations.

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[4] Baer, Denise L. and David A. Bositis (1994), *Politics and Linkage in a Democratic Society*. Englewood Cliffs, NJ: Prentice-Hall.

[5] Maurice Duverger (1954), *Political Parties*. New York: John Wiley & Sons, Inc.

[6] Samuel J. Eldersveld (1964), *Political Parties: A Behavioral Analysis*. Chicago: Rand McNally.

Political parties generally have a party charter and party rules. Party leaders are elected by party members – usually delegates at party conventions. Parties have a party platform, which identifies the party's formal principals and issue positions and does so in a public fashion. Parties have organizational meetings, including conventions, and if the party is organized at different levels (state, local), it usually has conventions and other meetings relevant to the different levels of the party. Parties generally have a permanent headquarters with staff and volunteers. Finally, parties engage in issue advocacy and they spend money on public communications and media in connection with that advocacy.

As noted above, American parties are *cadre* style parties, and do not have mass membership. The voters who support a party at election time, but who otherwise do not participate in any party affairs are generally referred to as the *party-in-the-electorate*.[7] The vast majority of Americans do **not** participate in party affairs. However, most Americans do identify with a political party. For most people, party identification is a subjective state, which is associated with certain in-group perspectives, and is likewise associated with an individual's voting choices.

The relationship between a party and its followers in the electorate is based upon a number of factors. First, the party is widely recognized as representing the interests – and identifiers – of those groups associated with the

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[7] V.O. Key (1964), *Politics, Parties, and Pressure Groups*. New York: Thomas Crowell.

party (*e.g.*, the GOP and the Christian Coalition and the Democratic party and organized labor). The formal principles of the party are generally ones its followers subscribe to. Elected officials and candidates publicly identify themselves by the party label, and to a significant degree personify the party to followers (a role also played by the party's chairman or chairwoman). Political parties communicate with their followers, especially with regard to their endorsements and candidate slate. Finally, the media reports on the activities and positions of political parties, including coverage of their conventions and candidates.

As noted above, parties contest elections, and seek offices and power in government. In order to contest (and win) elections, parties raise and spend money on election-related (and organizational) activities, including GOTV (get out the vote) efforts. When possible, political parties use the reapportionment process to gain electoral, and hence political, advantage; district lines can be drawn that distribute likely supporters – and opponents – in such a way as to enhance a party's chances of electoral success, *i.e.*, gerrymandering. Parties also train their campaign workers, including candidates, volunteers, and poll watchers. And, of course, parties slate and endorse candidates. Parties not only recruit and support candidates, but also candidates generally seek the endorsement of the party.

In order to influence (*seek power*) government, parties generally have party organizations in legislative bodies[8] (*e.g.*, the Democratic Caucus or the Republican Conference). Parties usually have a party 'program' in the legislature (however specific or general) for which it lobbies support (*e.g.*, the Contract with America). The legislative program is connected to the party's principles and public program. As part of this process, parties occasionally have to enforce party discipline in order to facilitate the enactment of their party program. The nature of this party discipline varies, but often includes withholding resources, withdrawing endorsements, recruiting and supporting opponents at election time, denying favorable committee assignments, and in extreme cases, removing members from favored committees (*e.g.*, Democrats in the U.S. House tossed U.S. Senator (then Representative) Phil Gramm (TX) off the House Budget Committee).

In sum, the overall democratic process has freely associating citizens organized as a political party with the intention of contesting elections and seeking power. The principles and objectives of the party are what attracts support from the *party-in-the-electorate*, and once elected, the party seeks to implement its objectives in the best way possible, including contesting elections and formulating a legislative agenda. Thus, political party organizations represent the representational linkage between followers, whose principal political activity is voting, and

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[8] In American political party literature, this is referred to as the *party-in-office*, a term coined by V.O. Key [see note 7].

legislators (and other public officials) who pass legislation and raise and spend money as part of the governmental roles.

THE ALABAMA DEMOCRATIC CONFERENCE.

Based upon the criteria outlined above, and reading the depositions of Joe Reed and Jerome Gray of the Alabama Democratic Conference (ADC), I concluded that the Alabama Democratic Conference is a functioning political party – in all but name only – at the state and local level in Alabama. I will review the activities and organization of the ADC based upon the depositions.

The ADC is a cadre style organization with a significant membership, but by no means is it a mass membership party. There are both members and volunteers in the ADC. The organization of the ADC, like the two major parties, is stratarchical with respect to the component organizations in the ADC. According to the depositions, there is a state committee, county-level committees (which predominate), and local committees in the ADC. In making endorsements, members from relevant jurisdictions, *e.g.*, counties, have the principal voice in determining who the ADC endorses for county-wide office. A committee of the statewide organization makes similar decisions regarding statewide candidates and issues.

The ADC has a formal charter and party rules and by-laws. Officers are elected by the membership. The ADC has a formal statement of principles, and publicly takes positions on a variety of political issues. The ADC holds regular organizational meetings at both the state

and county level, including conventions twice a year. The ADC has a permanent headquarters with paid staff as well as numerous volunteers. Finally, the ADC engages in on-going issue advocacy with regard to its primary agenda which is aimed at improving the lives of the black citizens of Alabama.

While the membership of the ADC is comparatively small, as indicated above, the ADC – like other American political parties – is a cadre style party. While the ADC does not have a large membership (relative to the electorate or to the black electorate), a large proportion of black voters in Alabama identify with the ADC, just as some white citizens identify with the Republican party. These citizens – mostly black – view the ADC as representing their interests in Alabama politics. They (the black identifiers with the ADC) generally favor the party's principles and issue positions. They are aware of the ADC and its program through the communication and outreach efforts of the ADC itself, but also through the mass media, which publicizes the ADC; the media coverage reflects a recognition of the ADC's relationship with a substantial portion of the black electorate in Alabama.

There are black members of the state legislature and other black officeholders in Alabama who publicly identify themselves as ADC members and supporters, and this influences ADC identifiers' vote choices. Probably two of the most prominent public symbols of the ADC are its chairman, Joe Reed, and its yellow sample ballot. Candidates for public office, white and black, appear before ADC screening committees, to seek the endorsement of the ADC for their election races. Those candidates – again black and white – who receive the ADC's

endorsement generally receive the support of the ADC's identifiers.

The ADC as a party, operates within the larger Democratic party, and thus does not have a separate ballot line such as third parties like the Libertarian Party or the Reform Party. The ADC only endorses Democratic candidates. It has not become a formal third party because the ADC does not believe that the isolation of Alabama's black citizens, who are in the minority, would achieve the goals of the ADC. By working with white Democrats (and others) and engaging in the give-and-take and compromise of everyday politics within the Democratic party, the ADC seeks equity for Alabama's black citizens. However, it remains an independent organization by raising its own money, selecting and supporting its own slate in the Democratic primaries, formulating its own agenda, and endorsing – or failing to endorse – Democratic nominees in the general election. Independent parties frequently endorse the nominees of other (in the U.S., the Democrats and Republicans) parties. The Reform party (associated with H. Ross Perot) and the Liberal and Conservative parties in New York and New Jersey, often endorse Democratic and Republican candidates if they believe their endorsements would further their party's interests.

One of the ADC's principal goals in contesting elections is to get more black candidates nominated and elected to office, and to get sympathetic [with the ADC's goals] white Democrats nominated and elected. In order to achieve this goal, the ADC raises money and engages in a variety of election related activities. Like other political parties, the ADC has attempted to use the reapportionment process to distribute (in legislative districts)

their likely supporters – and opponents – to their advantage (see Reed deposition).[9] The ADC trains volunteers and members to engage in a variety of electoral activities, including running for office, communicating with voters, and poll watching. The ADC has a major GOTV effort every election cycle. Depending on the circumstances, the ADC both encourages and discourages black candidates to seek office. Part of the long-term election activities of the ADC is to research the vote of ADC supporters (identifiers), and to communicate that knowledge to those considering running for office.

There are a number of members of the legislative black caucus in the Alabama legislature who are ADC supporters, and these members frequently meet with the ADC. At the ADC's last convention, there were several black legislators in attendance. Each legislative session, the ADC has a number of items comprising its agenda, and the ADC leadership lobbies the legislature – both black and white members – to obtain support for that agenda. This is a process that often involves compromising and 'horse trading', but occasionally it requires the ADC to 'enforce party discipline'. In the past, when legislators have received endorsement and other support from the ADC, and once elected, break their commitments to the ADC or immediately lose their interest in the ADC agenda, the ADC has withdrawn their endorsements, encouraged opposition candidates in the primaries, and otherwise sought to 'punish' the errant legislator.

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[9] In his deposition, Jerome Gray discussed the ADC's knowledge (and research) of where its electoral supporters, and opponents, were located.

In conclusion, the ADC functions much as a political party functions. There is a cadre style party organization at the state, county, and local level. There is a formalized party structure with rules and regular procedures, and well articulated principles. The ADC serves as a link between its identifiers in the electorate and the state government, with its political leverage based upon the support of its identifiers in the election process.

THE JEFFERSON COUNTY CITIZENS COALITION.

Again, based upon the criteria outlined above, and reading the deposition of Richard Arrington of the Jefferson County Citizens Coalition (JCCC), I concluded that within the context of Jefferson County, the JCCC is a functioning political party. I will review the activities and organization of the JCCC based upon the deposition.

The JCCC is a cadre style organization with a comparatively small membership, and not a mass membership party. There are both members and volunteers in the JCCC. The organization of the JCCC, is unlike the two major parties and the ADC, since it is primarily based in Jefferson County, and hence does not require different levels of organization. According to ex-Mayor Arrington's deposition, there are different committees in the JCCC which deal with various issues and activities.

The JCCC has a formal charter[10] and party rules and by-laws. Officers are elected by the membership. The JCCC has a formal statement of principles, and publicly

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[10] See deposition of Richard Arrington.

takes positions on a variety of political issues. The JCCC holds regular organizational meetings. The JCCC has a permanent headquarters with a small staff. At different times in the past, the JCCC has had paid staff, and at others none. Finally, the JCCC engages in on-going issue advocacy with regard to its primary agenda which is largely aimed at improving the lives of the black citizens of Jefferson County.

While the membership of the JCCC is small, the JCCC – like other American political parties – is a cadre style party. While the JCCC's membership is small, a significant proportion of black voters in Jefferson County identify with the JCCC and its objectives. These citizens are mostly black, and they view the JCCC as representing their interests in county and state politics. They (the black identifiers with the JCCC) generally favor the party's principles and issue positions. They are aware of the JCCC and its program through the communication and outreach efforts of the JCCC itself, but also through the media in Jefferson County, which publicizes the JCCC; the media coverage reflects a recognition of the JCCC's relationship with a substantial portion of the black electorate in Jefferson County.

There are a small number of black members of the state legislature and other black officeholders, principally in Jefferson County, who publicly identify themselves as JCCC supporters. At the present time, probably two of the most prominent public symbols of the JCCC are its chairman, and (long-time) Birmingham ex-Mayor Richard Arrington, and its white sample ballot (which has ex-Mayor Arrington's picture on it). The JCCC has procedures for endorsing candidates for public office, and

the JCCC endorses both white and black candidates. Unlike the ADC, the JCCC is not affiliated with the Democratic party. However, ex-Mayor Arrington indicated in his deposition that the JCCC rarely, if ever, endorses Republican candidates in general elections. Those candidates – again black and white – who receive the JCCC's endorsement generally receive support from the JCCC's identifiers.

The JCCC is an independent organization not affiliated with any other party. It does not have a separate ballot line such as third parties like the Libertarian Party or the Reform Party. When it endorses, the JCCC generally endorses Democratic candidates in general elections. However, it is an independent organization, it raises its own money, it selects and supports its own slate in the Democratic primaries, focuses on its own agenda, and endorses – or fails to endorse – Democratic (usually) nominees in the general election. As noted above, small independent parties often endorse the nominees of other parties.

One of the JCCC's principal goals in contesting elections is to get more black candidates nominated and elected to office, and to get sympathetic [with the JCCC's goals] white candidates nominated and elected. In order to achieve this goal, the JCCC raises money and engages in a variety of election related activities. The JCCC trains volunteers and members to engage in a variety of electoral activities, including running for office, communicating with voters, and poll watching. The JCCC has a GOTV effort in Jefferson County every election cycle. Unlike the ADC, which is associated with the Democratic

party, the JCCC is not as likely to discourage black candidates from seeking office, even if their prospects are questionable.

There are a few members of the legislative black caucus in the Alabama legislature who are JCCC supporters, and these members meet with the JCCC and its leadership. Since the JCCC is based in Jefferson County, its influence is largely derived from its influence there.

In conclusion, the JCCC functions much as a political party functions. There is a cadre style party organization at the county level. There is a formalized party structure with rules and regular procedures, and well articulated principles. The JCCC serves as a link between its identifiers in the electorate and county (and state) government, with its political leverage based upon the voter support from its identifiers in Jefferson County.

THE ALABAMA NEW SOUTH COALITION.

Based upon the criteria outlined above, and reading the deposition of Henry Sanders, chairman of the Alabama New South Coalition (ANSC), I concluded that the Alabama New South Coalition is a functioning political party in about a third of Alabama's counties and consequently also at the state level in Alabama. I will review the activities and organization of the ANSC based upon the depositions.

The ANSC is a cadre style organization with a modest membership, and not a mass membership party. There are both members and volunteers in the ANSC. The organization of the ANSC, like the two major parties, is

stratarchical with respect to the component organizations in the ANSC. According to the deposition, there is a state committee, county-level committees in the counties where the ANSC is active, and local committees in the ANSC. In making endorsements, members from relevant jurisdictions, *e.g.*, counties, have the principal voice in determining who the ANSC endorses for county-wide office. A committee of the statewide organization makes similar decisions regarding statewide candidates and issues.

The ANSC has a formal charter and party rules and by-laws. Officers are elected by the membership. The ANSC has a formal statement of principles, and publicly takes positions on a variety of political issues. The ANSC holds regular organizational meetings, including a convention once a year. The ANSC has a permanent headquarters with a small paid staff as well as numerous volunteers. Finally, the ANSC engages in on-going issue advocacy with regard to its primary agenda which is aimed at improving the lives of the black citizens of Alabama.

While the membership of the ANSC is comparatively small, as indicated above, the ANSC – like other American political parties – is a cadre style party. While the ANSC does not have a large membership relative to the black electorate, a significant proportion of the black voters in those counties in Alabama where the ANSC is active (and not in competition with the ADC and other organizations) identify with the ANSC. These citizens – mostly black – view the ANSC as representing their interests in county and Alabama politics. They (the black identifiers with the ANSC) generally favor the party's

principles and issue positions. They are aware of the ANSC and its program through the communication and outreach efforts of the ANSC itself, but also through the mass media, which publicizes the ANSC; the media coverage reflects a recognition of the ANSC's relationship with a substantial portion of the black electorate in Alabama.

There are black members of the state legislature and other black officeholders in Alabama who publicly identify themselves as ANSC members and supporters. Chairman Sanders is a member of the Alabama State Senate. Presently two of the most prominent public symbols of the ANSC are its chairman, Senator Sanders, and its blue sample ballot. Candidates for public office, white and black, seek the ANSC's endorsement for their election races. Like the JCCC, the ANSC is less likely than ADC to discourage black candidates from entertaining improbable election contests. Those candidates – again black and white – who receive the ANSC's endorsement generally receive significant support from ANSC's identifiers.

The ANSC, like the JCCC is independent, and not affiliated with the Democratic party. While the ANSC has no rule (like the ADC) against endorsing Republicans, Senator Sanders in his deposition indicated that the ANSC in practice does not endorse Republican candidates. The ANSC is an independent organization, raising its own money, selecting and supporting its own slate in the Democratic primaries, formulating its own agenda, and endorsing – or failing to endorse – Democratic nominees in the general election.

As with the ADC and JCCC, the ANSC's principal goals in contesting elections is to get more black candidates nominated and elected to office, and to get sympathetic [with the ANSC's goals] white Democrats nominated and elected. In order to achieve this goal, the ANSC raises money and engages in a variety of election related activities. The ANSC trains volunteers and members to engage in a variety of electoral activities, including running for office, communicating with voters, and poll watching. The ANSC has a major GOTV effort every election cycle.

There are a number of members of the legislative black caucus in the Alabama legislature who are ANSC supporters, including Senator Sanders. The ANSC's legislative supporters meet with the ANSC and discuss legislative issues and strategies. Like the ADC, the ANSC has a number of items comprising its legislative agenda, and the ANSC leadership lobbies the legislature – both black and white members – to obtain support for that agenda.

In sum, the ANSC functions much as a political party functions. There is a cadre style party organization at the state, county, and local level. There is a formalized party structure with rules and regular procedures, and well articulated principles. The ANSC serves as a link between its identifiers in the electorate and the state government, with its political leverage based upon the support of its identifiers in the election process.

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Vita March, 1999

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EXPERIENCE

1990-Present. Senior Research Associate, The Joint Center for Political and Economic Studies, Washington, DC.

1988-1990. Associate Professor, Department of Political Science, State University College – Potsdam, Potsdam, NY.

1982-1988. Assistant Professor, Department of Political Science, The George Washington University, Washington, DC.

PUBLICATIONS

BOOKS

Bositis, David A. (ed.) 1998. *Redistricting and Minority Representation: Learning from the Past, Preparing for the Future.* Washington, DC: The Joint Center for Political and Economic Studies.

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Associate Justice John Paul Stevens cited my research in his dissenting opinion in *Bush v. Vera*, 1996.

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Bositis, David A. 1997. *Report of Dr. David A. Bositis, November 2, 1997.* Sinkfield, *et al.*, *v.* Bennett, State of Alabama, Circuit Court of Montgomery County.

AFRICA

Benin Project. I have travelled to Benin in French West Africa five times over the course of 1996-1997 to work with nongovernmental organizations (NGO) in conducting electoral studies. The results from the first completed study on the 1996 Beninoise Presidential Election were presented at a conference in Cotonou, Benin in September 1997. At that conference I spoke on the importance of electoral research in democratic societies.

PUBLIC PRESENTATIONS

1999

March The Anti-Defamation League of B'nai B'rith, Office of National and Government Affairs, Washington, D.C. **Presentation before the National Black-Jewish Task Force.**

The Sentencing Project, One Washington Circle Hotel, Washington, DC. **Presentation on Race and the Permanent Disenfranchisement of Felons.**

February The Coleman A. Young Detroit Democratic Club, Detroit Athletic Club, Detroit, Mi. **Keynote Speaker, Presentation on the 98' Black Vote and the Black Agenda for 1999-2000.**

January The College Board Government Affairs Committee, Hampshire Hotel, Washington, DC. **Presentation on the 98' Midterm Elections and Education Issues.**

U.S. Department of State, Foreign Service Institute, 41*st* Senior Seminar, NFATC, Arlington, VA. Presentation on Polling and Governance.

1998

December. The Center for Economic Opportunity, National Press Club, C-SPAN, Washington, D.C. **Panel: Race in the 1998 Midterm Elections.** (Other Panelists were Linda Chavez, Stuart Rothenberg, and Tom Edsall).

Democratic National Committee & Donors, Mayflower Hotel, Washington, DC. **Presentation on the Black Vote in the 1998 Midterms.**

November. Joint Center for Political and Economic Studies, Board Dinner, Washington, DC. **Presentation on 1998 Midterm Elections.**

Institute for Educational Leadership, Washington, DC. **Presentation on 1998 Midterm Elections.**

October. Joint Center for Political and Economic Studies, National Press Club, Washington, DC. **Presentation on the 1998 Joint Center National Opinion Poll.**

September. National Black Conservative Leadership Conference, Washington, DC. **Presentation on 1998 Elections and Prospects for Black Conservatives' Agenda and Candidates.**

Congressional Black Caucus Weekend/Braintrust Panel: **Political Power in the Black Community: The Next Generation.**

August. National Governors' Association Meeting, Milwaukee, WI. Luncheon Speaker, Corporate Fellows Luncheon. **Presentation on the 1998 Midterm Elections.**

July. Annual Meeting of the NAACP, Atlanta, GA. **Presentation on Elections and Generational Issues.**

Annual Meeting of National Association of Black Journalists, Washington, DC. **Speak on Press Coverage of Black Elected Officials** (Other Panelists: Sen. Carol Moseley-Braun, Reps. John Lewis and Mike Espy, Gwen Ifill, and Sonya Ross)

June. First Thursday Session of the New Synthesis Group, Washington, DC. **Presentation on Black Politics and Generational Issues.**

Annual Meeting of National Newspaper Publishers Association, Memphis, TN. **Presentation on Generations and Politics, 2000 Census, and Redistricting.**

Brown Bag Lunch at Economic Policy Institute, Washington, DC. **Presentation on Black Politics and Generational Issues.**

May. NAACP Legal Defense and Educational Fund, New York, NY. **Presentation on Voting Rights and Black Political Participation.**

April. Democratic National Committee (Senior Staff). **Presentation on Black Politics and the Democratic Party.**

1997

November. National School Boards Association, Council of Urban Boards of Education, Doubletree Hotel, Tucson, AZ. **Panel: School Vouchers.**

September. Republican National Committee, New Majority Council, Hyatt-Regency Capitol Hill, Washington, DC. **Panel: The Republican Party's Prospects with Minority Voters.** Other panelists were Ed Goeas of the Tarrance Group and Wes Anderson of Fabrizio, McLaughlin & Associates.

September. Senior Symposium, Senior Class and Faculty, Lynchburg College, Lynchburg, VA. **Presentation: Voting Rights in America.**

August. First Annual Operation Push/Rainbow Coalition Convention, Chicago Hilton, Chicago, IL. **Panel: The 2000 Presidential Election.** The other panelists were former New York City mayor David Dinkins, NAACP President Kweisi Mfume, and Robert Borosage of the Economic Policy Institute. Rev. Jackson was the moderator.

August. Forum on Renewing the Voting Rights Act organized by U.S. Rep. Cynthia McKinney (D-GA), U.S. Capitol, House Ways and Means Committee Hearing Room, Washington, DC. **Panel: The Persistence of Racially Polarized Voting.** Other panelists were SCLC President Dr. Joseph Lowery, Brenda Wright of the Lawyers' Committee for Civil Rights, and Professor J. Morgan Kousser of the California Institute of Technology.

July. Arthur F. Burns Fellowship Program. International Center for Journalists, Washington, DC. **Topic: Race and Politics.**

June. Joint Center for Political and Economic Studies, National Press Club, Washington, DC. Release of

Joint Center's 1997 National Survey on Race Relations. Other Panelists included Joint Center President Eddie Williams, former Mississippi Governor William Winter, and Black Leadership Forum Executive Director Yvonne Scruggs.

January. National Commission on Civic Renewal, Sam Nunn and Bill Bennett, Co-Chairs, Plenary Session, Hotel Washington, Washington, DC. **Testimony on Race and Civil Society.**

January. Joint Center for Political and Economic Studies, Sheraton-Carlton, Washington, DC. **Panel: The 2000 Reapportionment and Minority Representation.**

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IN THE FIFTEENTH JUDICIAL CIRCUIT

MONTGOMERY COUNTY, ALABAMA

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, AND ANDREW HAYDEN, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS, VS. JIM BENNETT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE STATE OF ALABAMA, DEFENDANTS.	)	CV-93-689
JOHN RICE AND CAMILLA L. RICE, INDIVIDUALLY AND ON BEHALF OF A CLASS OF NON-AFRICAN-AMERICAN VOTERS, INTERVENING PLAINTIFFS.	)	

Testimony of Jimmy Clark

* * *

[439] Q ALL RIGHT. AND IN THE PROCESS, THERE WERE COMMENTS, AND THERE WERE LEGISLATORS OR OTHER REPRESENTATIVES THAT HAD BILLS THAT THEY WANTED THE COMMITTEE TO CONSIDER; IS THAT CORRECT?

A THAT'S CORRECT.

Q ALL RIGHT.

A MR. CAMPBELL HAD A BILL; MR. CURRY AND MR. BOX HAD A BILL; MR. PERDUE FROM BIRMINGHAM HAD A BILL. JUST ABOUT EVERYBODY AND HIS BROTHER [440] HAD A BILL THAT THEY WANTED. ALL OF THEM WERE DIRECTED . . .

Q ALL RIGHT.

A MOST OF THEM WERE DIRECTED AT GETTING ME OUT OF THERE, MY DISTRICT, SO THAT THEY COULD ELECT A NEW SPEAKER.

Q ALL RIGHT. AND ACTUALLY, THESE BILLS WERE VOTED ON AS AMENDMENTS, WERE THEY NOT?

A THEY WERE. THERE WERE – MOST OF THEM WERE ALLOWED TO, IF THEY COULD GET ENOUGH SECONDS. I DON'T KNOW IF ALL OF THEM GOT A SECOND OR NOT. MOST OF THEM WERE CONSIDERED BY THE COMMITTEE. A LOT THEM WERE TURNED DOWN BY THE COMMITTEE, BUT SOME OF THEM – WHEN THEY TOOK IT BACK AND REPORTED OUT, I'VE FORGOTTEN WHAT THE COMMITTEE'S BILL, WHAT EXACTLY THAT WAS; BUT THAT'S WHEN WE DEFEATED THAT AND CAME WITH A VOTE ON THE SO-CALLED REED PLAN.

Q AND SO IS IT SAFE TO SUMMARIZE THE PROCESS TO SAY THAT IT WAS A VERY CONTESTED MATTER OR ISSUE THAT CAME BEFORE THE HOUSE AS FAR AS GETTING A PLAN APPROVED?

A VERY MUCH SO.

Q ALL RIGHT. AND YOU MENTIONED THAT A NUMBER OF PEOPLE HAD PLANS BUT NONE OF

THOSE PLANS [441] PASSED EXCEPT THE ONE THAT ULTIMATELY WE ARE TALKING ABOUT HERE TODAY?

A THAT'S CORRECT.

Q ALL RIGHT. NOW, DO YOU KNOW JOE REED?

A YES.

Q AND DO YOU KNOW HIM AS CHAIRMAN OF THE ALABAMA DEMOCRATIC CONFERENCE?

A YES.

Q AND DID YOU HAVE THE OCCASION TO – FIRST OF ALL, LET ME ASK YOU THIS: JOE REED REPRESENTS A CONSTITUENCY; IS THAT CORRECT?

A THAT'S CORRECT.

Q AND WHAT DO YOU UNDERSTAND HIM TO – WHO HIS CONSTITUENCY IS?

A HIS CONSTITUENCY IS BASICALLY THE BLACK MEMBERS OF THE DEMOCRATIC, THE ALABAMA DEMOCRATIC CONFERENCE.

Q WHICH CONSISTS PRIMARILY OF BLACK CITIZENS IN THE STATE?

A AND SOME FEW WHITE; YES.

Q AND SOME WHITE. ARE THERE OTHER POLITICAL ORGANIZATIONS, BLACK POLITICAL ORGANIZATIONS IN THE STATE THAT YOU ARE AWARE OF?

A YES. WE'VE GOT THE NEW SOUTH ORGANIZATION WHICH IS THERE; AND THERE ARE OTHERS, I'M [442] SURE, BUT NOT OF ANY SIGNIFICANCE.

Q ALL RIGHT. NOW THERE IS ALSO THE JEFFERSON COUNTY COALITION THAT OPERATES OUT OF JEFFERSON COUNTY, IT OPERATES ESSENTIALLY IN THAT COUNTY. ARE YOU FAMILIAR WITH THAT ONE?

A YES.

Q ALL RIGHT. BUT AS FAR AS STATEWIDE, A.D.C. AND THE ALABAMA NEW SOUTH COALITION ARE TWO THAT YOU ARE FAMILIAR WITH THAT OPERATE STATEWIDE?

A YES.

Q OKAY. AND THEY HAVE A PRIMARILY BLACK CONSTITUENCY?

A NEW SOUTH IS KIND OF - IT'S REGIONAL, REALLY. IT'S HEAVY IN SOME AREAS, BUT IN OTHERS, THEY DON'T HAVE - I DON'T BELIEVE THEY HAVE AN ORGANIZATION IN BARBOUR COUNTY, AND MANY OF THOSE TYPE KINDS, MIDDLE-SIZED AND RURAL COUNTIES.

Q IN BARBOUR COUNTY, DOES A.D.C. HAVE A VIABLE -

A YES. THEY'VE ALWAYS BEEN VIABLE, BECAUSE WE ARE A HEAVILY POPULATED BLACK COUNTY.

Q HAVE YOU RECEIVED THE ENDORSEMENT OF THE A.D.C. FROM -

[443] A I'VE ALWAYS RECEIVED THE ENDORSEMENT OF THE A.D.C. I'VE ALWAYS RECEIVED THEIR VOTE WITH A HIGH PERCENTAGE OF THE BLACK VOTERS EVERY TIME I'VE RUN.

Q ALL RIGHT. NOW SPEAKING SPECIFICALLY OF THE PLAN THAT'S BEEN – AND YOU HAVE BEEN IN THE COURTROOM, SO YOU HAVE HEARD A LOT OF TESTIMONY THAT WAS DISCUSSED HERE TODAY. LET'S GO DIRECTLY TO THIS PLAN. WHAT WERE YOUR CONCERNS WHEN YOU AGREED TO THIS PLAN? THIS IS A PLAN THAT YOU SUPPORTED; IS THAT CORRECT?

A THAT'S CORRECT.

Q ALL RIGHT. WOULD YOU TELL THE COURT WHY YOU SUPPORTED THIS PLAN?

A I SUPPORTED THIS PLAN BECAUSE IT KEPT TOGETHER MANY OF THE RURAL COUNTIES OF ALABAMA; AND IN PARTICULAR, I WAS INTERESTED IN IT MORE SO IN THE EASTERN PART, BECAUSE THAT'S WHERE I LIVE. AND WE WORKED WITH – YOU MENTIONED MISS GUILLOT, AND HER PROBLEM. WE WORKED WITH HER. WE WORKED WITH PEOPLE ALL THE WAY UP AND DOWN TO THE LINE, TRYING TO GET ENOUGH PEOPLE TO, YOU KNOW, PUT TOGETHER TO HAVE SOME RURAL REPRESENTATION. WE WANTED TO CONTINUE TO HAVE [444] RURAL REPRESENTATION. THE TREND, OF COURSE, NOW IS THAT YOU'RE GOING TO QUIT HAVING ANY RURAL REPRESENTATION; YOU'RE GOING TO BE BACKED UP. IN THE NEXT CENSUS, YOU'LL BE BACKED UP AGAINST CITIES LIKE DOTHAN ON THE

SOUTH, AND PHENIX CITY, AND AUBURN AND OPELIKA ON THE NORTH. SO DAYS ARE NUMBERED FOR MY TYPE OF COUNTY AND MY TYPE OF REPRESENTATION.

Q ALL RIGHT. NOW, YOU DID PERSONALLY NEGOTIATE WITH JOE REED AS FAR AS THIS PLAN WAS CONCERNED, AND YOU MENTIONED MISS GUILLOT AND OTHERS; IS THAT CORRECT?

A YES.

Q AND DID YOU CONSIDER YOURSELF TO BE IN A NEGOTIATING PROCESS AS FAR AS GETTING WHAT YOU NEEDED OUT OF THIS PLAN?

A I CONSIDERED MYSELF TO BE IN A LIFE OR DEATH STRUGGLE FOR HOLDING ONTO A POLITICAL SEAT FOR BARBOUR COUNTY, FIRST, AND THAT WAS MY OBJECTIVE. AND, OF COURSE, MR. REED HAD, YOU KNOW, A LARGE GROUP OF BLACK MEMBERS IN MY COUNTY AND ALL OF THE SURROUNDING COUNTIES, SO NATURALLY, I WORKED WITH THEM.

Q AND IN THE PROCESS OF – WELL, WOULD YOU EXPLAIN WHY YOU FELT YOU WERE IN A LIFE OR [445] DEATH SITUATION?

A WELL, YOU KNOW, IN 1970, WHEN JUDGE JOHNSON HAD THIS REAPPORTIONMENT – HAD A FELLOW IN NEW HAMPSHIRE DRAW UP A PLAN, THEY SPLIT BARBOUR COUNTY INTO FOUR HOUSE SEATS AND THREE SENATE DISTRICTS. THEY ALL CAME INTO EUFAULA. FOR NINE YEARS, EUFAULA NEVER – I MEAN BARBOUR COUNTY NEVER HAD A

SINGLE ROAD OR ANYTHING THAT WAS DIVIDED UP BETWEEN THE COUNTIES. WE NEVER GOT ANY FOR NINE YEARS UNTIL THEY GOT - UNTIL THAT WAS CHANGED IN '83. AND SO, I REALIZED WHAT REAPPORTIONMENT OR WHAT REVISED REAPPORTIONMENT CAN DO TO DESTROY THE ECONOMIC INTEREST OF A COUNTY; AND I WAS FIGHTING FOR MY CONSTITUENCY TO SEE THAT THEY WERE GOING TO BE REPRESENTED IN MONTGOMERY.

Q ALL RIGHT. SO ONE OF YOUR CONCERNS WAS THAT YOU DIDN'T WANT BARBOUR COUNTY, AT LEAST, SPLIT UP LIKE IT HAD BEEN IN 1970?

A THAT'S CORRECT.

Q NOW, YOU WERE AWARE THAT SOME PLACES HAD TO BE SPLIT; IS THAT CORRECT?

A YES.

Q BUT YOU DIDN'T WANT BARBOUR COUNTY SPLIT?

[446] A THAT'S CORRECT.

Q AND THAT'S ONE OF THE REASONS WHY YOU SUPPORTED THE PLAN?

A YES.

Q NOW, THERE WERE PEOPLE WHO WERE ACTUALLY - WELL, LET ME ASK YOU THIS: WOULD YOU TELL THE COURT WHY, IF YOU KNOW, SOME OF THE OTHER PLANS WERE DRAWN. DID THEY HAVE A PURPOSE, IN TERMS OF YOUR SEAT?

A YES. SOME OF THEM – THE PREMISE, I THINK ON ALL OF THEM, WAS: THE FIRST THING YOU DO IS GET RID OF THE SPEAKER'S DISTRICT; AND THEN YOU MOVE TO TRY TO PUT TOGETHER A COALITION THAT YOU CAN – WHETHER IT'S IN JEFFERSON, OR IF IT'S THE REPUBLICANS OR THE DIFFERENT GROUPS, THEY WOULD COME TOGETHER. I THINK THERE WAS ONE, REPRESENTATIVE PERDUE, HE HAD ONE; SOME VOTER GROUP IN WASHINGTON OR SOMEPLACE WAS WORKING WITH HIM. MR. BOX AND MR. CURRY HAD ONE. MR. BOX FROM MOBILE AND MR. CURRY FROM JEFFERSON. IT WAS AIMED AT MORE REPRESENTATION IN URBAN AREAS. MR. CAMPBELL HAD A PLAN BECAUSE HE WANTED TO BE SPEAKER OF THE HOUSE. LET ME THINK. RIGHT OFF, THERE WERE ABOUT FIVE DIFFERENT PLANS [447] FLOATING AROUND, ALL OF THEM – THEY ALL HAD SIMILAR MOTIVES, YOU KNOW; IT WAS EITHER TO PUT SOME INDIVIDUAL IN A BETTER POSITION TO MAKE A MOVE TOWARDS A LEADERSHIP POSITION, OR At LEAST TO GET MORE REPRESENTATION FOR URBAN INTEREST.

Q AND IN SOME OF THESE PLANS, THEY TENDED TO CARVE UP BARBOUR COUNTY, FOR EXAMPLE?

A WELL, ALL OF THEM DID; YES, SIR.

Q AND SO, IS IT A FAIR STATEMENT TO SAY THAT THERE WAS A LOT OF POLITICKING GOING ON AS FAR AS THESE DISTRICTS –

A YES, SIR.

Q - AND GETTING THE VARIOUS PLANS -

A THAT'S CORRECT.

Q - APPROVED?

A THAT'S RIGHT. VERY MUCH SO.

Q AND, IN EFFECT, ALL OF THESE PLANS WERE DEFEATED; IS THAT CORRECT?

A THAT'S CORRECT.

Q AND THE PLAN THAT WE HAVE BEEN IN COURT ON TODAY IS THE ONE THAT ULTIMATELY PASSED THE HOUSE?

A THAT'S CORRECT.

Q AND, IN YOUR OPINION, WHAT DID IT TAKE TO GET [448] THIS PLAN PASSED BY THE HOUSE?

A WE HAD TO BE SURE THERE WAS A SUFFICIENT NUMBER OF SEATS TAKEN CARE OF THAT WE COULD GET TO VOTE ON THE FLOOR, THAT WE WERE ABLE TO DO THAT.

Q AND DID THIS PLAN ACCOMMODATE WHITE REPRESENTATIVES?

A OH, YES. IT ACCOMMODATED WHITE AND BLACK.

MR. DAVIS: I THINK THAT'S ALL I HAVE, YOUR HONOR.

THE COURT: ALL RIGHT. MR. MONTIEL.

MR. MONTIEL: ALL RIGHT, SIR.

CROSS EXAMINATION

(BY MR. MONTIEL:)

Q MR. SPEAKER, DID ANY PLAN GET THE SUPPORT OF THE SENATE?

A NO, SIR.

Q WHAT WERE THE REASONS FOR THAT?

A I REALLY CAN'T SAY EXCEPT THEY HAVE A HISTORY OF NOT PARTICULARLY FOLLOWING THROUGH ON CONTROVERSY OR ANY OTHER TYPE OF LEGISLATION TO THE BENEFIT OF THE PEOPLE OF THE STATE OF ALABAMA.

* * *

[467] Q JUST THAT PART, MR. SPEAKER. WHEN IT WAS ACTUALLY SUBMITTED TO THE COURT, WHAT, IF ANYTHING, DID YOU DO TO GET THE PLAN SUBMITTED TO THE COURT BY THEN SECRETARY OF STATE CAMP AND THEN ATTORNEY GENERAL OF ALABAMA, JIMMY [468] EVANS?

A OH, I THINK WE MAY HAVE DISCUSSED IT WITH CAMP. I BELIEVE HE SAID IT WAS ALL RIGHT. I THINK I DISCUSSED IT WITH JIMMY EVANS, AND I BELIEVE HE SAID IT WAS ALL RIGHT.

Q DID EITHER MR. CAMP OR MR. EVANS EXPLAIN TO YOU THESE MAPS THAT I'VE SHOWN YOU TODAY OR THE EFFECT IT WAS GOING TO HAVE ON THE DISTRICTS IN ALABAMA?

A WE DIDN'T – I DIDN'T GO INTO GREAT DETAIL WITH THEM.

Q WAS THERE ANY DISCUSSION OR WERE YOU AWARE OF THE FACT THAT THE DISTRICTS, THE MAJORITY BLACK HOUSE DISTRICTS WERE UNDER-POPULATED FROM THE IDEAL IN 25 OF 27 DISTRICTS?

A I CAN'T SAY THAT. I KNEW A LOT OF THEM WERE CLOSE. WE WENT OVER A LOT OF THEM. WE WENT THROUGH AND SAW WHAT THE BLACK-WHITE WAS AND WHETHER IT WAS OVER OR UNDER ON ALL OF THEM.

Q ALL RIGHT.

A BUT I DIDN'T FORM ANY FIRM FEELING ABOUT THAT, IN DOING THAT, EXCEPT: DO WE HAVE THE VOTES? YOU KNOW, IN THE LEGISLATURE, IT IS: DO YOU HAVE THE VOTES TO PASS SOMETHING?

Q BUT WE ARE PAST THAT POINT.

[469] A YEAH.

Q THE LEGISLATURE IS THROUGH. ALL OF THESE FOLKS ARE RUNNING DOWN TO COURT. THE RICE'S [sic] WEREN'T IN IT THEN. THEY RAN OVER TO THE FEDERAL COURT, AND THEY RAN OVER TO THE STATE COURT, AND EVERYBODY FILED THE LAWSUIT. IN FACT, THESE FOLKS RIGHT HERE BROUGHT A LAWSUIT. (POINTING TO MR. DAVIS.)

THE COURT: JUST ASK YOUR QUESTIONS. ASK HIM WHAT DID HE DO.

Q AT THAT POINT IN TIME, AFTER THE LAWSUIT WAS BROUGHT AND THE LEGISLATURE IS THROUGH, WHAT -

A DID I DO ANYTHING?

Q YES, SIR.

A NO. I FELT LIKE THAT WAS OUTSIDE OF MY DOMAIN.

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TRIAL TESTIMONY OF ROBERT J. NORELL
JANUARY 20, 2000

ROBERT J. NORELL, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

MR. STILL: May it please the Court.

This is Doctor Robert J. Norell who is a professor of history at the University of Tennessee. He has previously taught history at the University of Alabama and at Birmingham Southern College. His field of specialization is twentieth [694] century American History and the history of the American South. He is the author of several books and numerous articles. His 1985 award-winning book Reaping the Whirlwind: The Civil Rights Movement in Tuscaloosa has recently republished in a revised edition.

Q. Is that correct, Doctor Norell?

A. Yes.

Q. Did we – that is, the lawyers representing the Sinkfield parties in this case – ask you to research the history of black political organizations in Alabama and the history of the reapportionment process in Alabama?

A. Yes.

Q. How did you go about trying to answer those questions for us?

A. I used the method that I use in any research project, which is to reading secondary literature, primary documents that pertain to these particular issues, and in some cases I did some interviews.

Q. Based on your historical reading, did blacks participate in political associations in Alabama in the late 19th century; that is, after they were freed?

A. Yes.

Q. And what sort . . . When exactly did these associations begin to appear?

A. They appeared as soon as the African-Americans were [695] enfranchised in 1867 in Alabama. Organized originally through the union leagues, voting membership in the Republican party. A little later in the 19th century some African-Americans aligned with the third party candidates, being the Populists.

Q. Did these political associations disappear after the 1901 constitution?

A. Once the vast majority of African-Americans were disenfranchised, yes, there were relatively fewer. There was little cause to be organized politically.

Q. When did these associations begin to reappear?

A. They began to reappear in the 1930's when gradually a few African-Americans, primarily in cities in Alabama, began to get registered to vote and began to be politically active.

Q. And did these . . . Under what types of names did these associations go?

A. Well, they emerged as civic associations. For example, the Tuskegee Civic Association, there was the Jefferson County Progressive League, the . . . ultimately the Montgomery Improvement Association were all civic and political organizations at the same time.

Q. Is your book, Reaping the Whirlwind, partly about the Tuskegee Civic Association?

A. Yes, it is.

Q. How was the Alabama Democratic Conference begun?

A. The Alabama Democratic Conference emerged from the [696] creation, in 1960, of the Southern Democratic Conference, which was an organization of southern African-Americans originally meeting in Atlanta to help the candidacy of John Kennedy whom they supported. The people who went to that meeting from Alabama came home and created the Alabama Democratic Conference as the state arm of the Southern Democratic Conference.

Q. And the Alabama Democratic Conference that we know today is the continuation of that same organization?

A. That's right.

Q. All right. Are there other significant black political associations now in Alabama?

A. Yes. There are statewide . . . other statewide organizations, like the New South Coalition. There are organizations that are essentially city organizations, such as the Citizens Coalition in Jefferson County.

Q. Have you reached a conclusion as to whether black political organizations have represented a broad community of political interests among black voters?

A. Yes.

Q. What is your conclusion on that?

A. My conclusion is that the political organizations, like the Alabama Democratic Conference or the New South Coalition or the Citizens Coalition, all represent the perception among African-Americans that they have common political interest and that they should act in common to pursue this interest.

[697] Q. Turning now to the issue of legislative redistricting. Have you studied that issue in Alabama?

A. Yes.

Q. And generally tell us why the legislature refused to redistrict from 1901 until 1964 as required by the Alabama constitution.

A. Well, typically that is explained, essentially, by the concentration of power in the legislature among people who had a strong community of interest themselves – that is, essentially the white planter interest in the black belt – and they had a highly disproportionate influence, especially over time, in the legislature. And they simply refused to honor the constitutionally mandated reapportionment.

Q. After the Reynolds versus Simms decision, what was the first priority among legislators, according to your research, after they had complied with the . . . while they were complying with the one-person, one-vote mandate?

A. Well, once reapportionment actually happened, we saw in Alabama in the reapportionment of the legislature, as we had seen in other reapportionment activities historically, the first commitment is for the protection of incumbents.

MR. STILL: All right. With that, Your Honor, our direct examination of Doctor Norell ends.

We have already produced for the Court – I believe it has been filed with the Court – the report of Doctor Norell [698] with his vitae attached. But if you would like us to, we can mark it as a separate exhibit, which I can have copied –

JUDGE THOMPSON: You say you have already filed it?

JUDGE ALBRITTON: It is in the file in connection with motions. It's not before us at this trial.

Anything like that, you need to offer as an exhibit.

MR. STILL: Thank you, Your Honor. We will get it marked and present that tomorrow morning.

I understand it has already been marked as Exhibit 187.

MR. MARKHAM: My notes indicate that the Sinkfield defendants identified it at some point.

MR. STILL: We move it's introduction now.

JUDGE THOMPSON: Do you have one copy or more than one copy for the Court, Mr. Still?

MR. STILL: I am just checking with Mr. Blacksher.

We will get copies no later than tomorrow morning if you don't have them before you right now.

JUDGE ALBRITTON: All right. Mr. Markham?

CROSS EXAMINATION BY MR. MARKHAM:

Q. Doctor Norell, when did you the prepare this report?

A. I prepared this report, I believe, in October.

Q. October of this year?

A. October of 1999.

Q. And is it essentially the same report you wrote sometime [699] earlier for the state court litigation?

A. Honestly, I don't remember if I wrote a report for the state court litigation. I did testify to the same set of facts and opinions.

Q. Can you tell us what specific information you reviewed with respect to the origins of the current plan and the motivations that went into the current plan in 1993?

A. I did not review the current plan. I only looked at the history of black political organizations and the history of reapportionment.

Q. Do you have any information regarding what percentage of African-Americans in the state of Alabama are members of the Alabama Democratic Conference?

A. No.

Q. Or of the New South Coalition?

A. No.

Q. Or of the Jefferson County Citizens Coalition?

A. No.

Q. Or of the Montgomery Improvement Association?

A. No.

Q. What about the Tuskegee Improvement Association? How many members were there in that?

A. The Tuskegee Civic Association had, at any one time, a few hundred members.

Q. Would you agree that in the 1993 plan, developed by . . . [700] known as the Reed-Buskey plan, that protection of incumbency was as [sic] less important interest than in prior plans?

A. As I said, I did not research the history of particular reapportionment plans; certainly not in the 1990's. So, I don't know the answer to that.

Q. Did I understand you to say that order of interest in incumbency protection was the primary interest and support for the Democrat party candidates would be a secondary interest in the legislature?

A. My opinion is that the protection of incumbency is the primary motivation for decision making in reapportionment considerations and that, as my statement, suggests secondary considerations include partisan concerns, and since 1965, the secondary concern has been the concern for vote dilution of African-Americans and other minority groups.

Q. Until what period of time does your report address this history of Alabama? What is the cut off of time?

A. Well through, say, the mid '80's. The New South Coalition was created in 1986. That is really where I carried my research forward to.

Q. Is there a reason, in preparing a history of redistricting in Alabama, that you stopped in 1986 and didn't come forward to the present time?

A. I stopped at 1986 because that is where my interest on the . . . focus on the black political organizations took me to. [701] I was simply not asked to research the history of the 1990's reapportionment plans.

Q. So, you don't have any information to offer this Court on whether in developing that plan, some other interests may have taken precedence over preserving incumbents' districts?

A. I don't have any information.

Q. And you don't have any information to offer the Court as on whether in 1993 in developing the Reed-Buskey plan some other interest may have taken precedence over maintaining Democratic control of districts?

A. I have done no research other than to sit here and listen to the people who have testified to that today. And that was consistent with what I believe about the primacy of incumbency.

Q. Well, the testimony you heard with respect to the primacy of incumbency do you have any information on whether incumbents were paired in the creation of the 1993 plan? Do you have any information?

A. I'm sorry I don't understand, could you repeat the question?

Q. In developing your report did you look at any time at the number of incumbents who were paired in the preparation of these various redistricting plans?

A. I don't understand what you mean by paired.

Q. Two incumbents placed in the same district and one district left with no incumbent; an open seat?

[702] A. I don't have any information on that.

MR. MARKHAM: I have no other questions.

MR. STILL: Nothing further.

MR. PARK: Nothing further for this witness.

JUDGE ALBRITTON: All right. You have nothing further, Mr. Still?

MR. STILL: No, Your Honor.

* * *

IN THE CIRCUIT COURT FOR

MONTGOMERY COUNTY, ALABAMA

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN, on behalf of themselves and others similarly situated,

Plaintiffs,

vs. CIVIL ACTION NO.

CV-93-689-R

JIM BENNETT, in his official capacity as Secretary of State of Alabama,

Defendants.

JOHN RICE and CAMILLA L. RICE, Individually and on behalf of a class of non-African-American voters,

Intervening Plaintiffs.

* * *

DEPOSITION OF JOE L. REED, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Offices of

REAGAN, PRUITT & CLARK
(334) 262-3376

[27] Q. Would you give your full name and address, please?

A. Joe L. Reed, R-E-E-D. Address, 874 John Brown Avenue, Montgomery, Alabama 36106.

Q. Okay. Dr. Reed, are you the – a member of the Alabama Democratic Conference?

A. Yes.

Q. Do you hold an office?

A. Yes.

Q. What?

A. Chairman.

Q. Is that statewide chairman?

A. Yes.

Q. How long have you been statewide chairman of [28] the Alabama Democratic Conference?

A. Since 1970.

Q. And how long have you participated in the activities of the Alabama Democratic Conference?

A. Since 1963, something like that. '62 or '63.

Q. When was the Alabama Democratic Conference founded?

A. 1960.

Q. Okay. What were the circumstances surrounding its founding, and who did it?

A. Well, at that time blacks were shut out of the democratic party. At that time the party had a emblem, a rooster crowing white supremacy. Still blacks – very few blacks could vote. We were still suffering from the legacy of Smith versus Alright, Proprietor Smith versus Alright.

Q. You're talking about the white primary?

A. The white primary. Blacks were not involved in the democratic primary because they were not allowed to be. So there were various black groups formed around the state locally.

[29] For example, the Jefferson County Progressive Democratic Council was one of the organizations.

I'm told that in 1960 when John F. Kennedy was running for president, Congressman William Dawson, a black congressman from Chicago, advised a young senator that there were a few blacks in the South that he ought to try to at least cultivate. Lewis Martin, who was a black journalist, met with a group of blacks from the South in Atlanta.

Q. Martin was connected with Kennedy somehow too, wasn't he?

A. Yes, he was connected with the Kennedy –

Q. Campaign?

A. – campaign. And these blacks met from several states and left with the pledge to go back to their respective states and form state organizations to try to help in that campaign. Arthur Shores –

Q. When you say state organizations, do you mean organizations in the black community [30] specifically?

A. Yes, organizations in the black community because blacks could not participate in the primary – I mean, in the democratic primary. And to some extent, the – these organizations were kind of protest organizations

in one respect because they could not participate in the regular party apparatus.

Arthur Shores was elected chair of the Alabama Democratic Conference. Others involved, Q.D. Adams of Etowah County, David Hood of Jefferson County who lived in Bessemer, Mrs. Beulah Johnson from Tuskegee, Dr. C.G. Gomillion of Tuskegee, plaintiff in the case of Gomillion versus Lightfoot; Rufus Lewis who was a person who had long been involved in voter registration and education in Alabama, and there were numerous others who were – put this organization together including Isom Clemmons who represented the labor organization – the labor union in Mobile, longshoremen. Those were the – some of the founders of the Alabama Democratic [31] Conference.

Arthur Shores served as chairman from 1960 to 1964, then from nineteen – Orzell Billingsley a black attorney from Birmingham served as chairman from 1964 to 1966. In 1966, Rufus Lewis was elected chairman. He served until 1970. In 1970, these gentlemen were what I call seniors to me. I was serving as executive secretary of the Alabama State Teachers Association, and my job required me to travel statewide.

Q. Okay. Before you get to that part and for the Record –

A. Okay.

Q. – Alabama State Teacher Association was the black teacher association at that time?

A. That is correct.

Q. All right. Before you get to your election –

A. Yeah.

Q. – that is before we pass over the founding events that you just described, prior to ADC's founding, had there been black political organizations operating at the local levels in [32] Alabama?

A. Yes.

Q. Could you tell us about those local organizations, and how far back do they go?

A. I mentioned the Jefferson County Progressive Democratic Council. It was formed – I don't know the exact founding date, but many years before. Mobile had the Nonpartisan Voters League that had been formed many years before. The Etowah County Voters League had been formed many years before. In fact, there were various voters leagues and civic leagues formed because that was an outlet by which blacks could express themselves civically and the few blacks that could vote politically.

Q. Now, when you say the few blacks who could vote, how many – how many blacks actually during that era of disfranchisement [sic] were there actually on the rolls?

A. I have those figures someplace. I just don't recall them offhand. But I guess at certain stages 20 to 25,000 statewide, and it grew as time moved on, but –

[33] Q. Were most of them registered in those urban areas that you're talking about now?

A. Well, some were, and some were not, depending on the county. For example, in Montgomery County there were very few blacks registered to vote; in Macon County

there were very few blacks registered to vote. And some other counties, there were more blacks registered to vote, Conecuh County, for example, Walker County, for example. You had a few more blacks registered in some of your larger counties because they could not threaten the white establishment anyway.

[38] Q. Did you – those of you who were registered in Conecuh County, was there a black political organization that operated in Conecuh County?

A. There was a group at that point. Of course, I made a mistake. Now, the Brock uprising – I call it that anyhow – was in the late '40s early '50s. Now, you've got to come down; now you're down in '60 where I am now, so we're a little further down the road.

Q. Okay.

A. But, yeah, there was Conecuh County Civic Association. And all of these organizations precede the ADC. Again, you had various little groups. Even in the teachers association, you had the – what are called the – we call the Vote Commission in the Alabama State Teachers Association where many teachers could not register to vote, but they were encouraged to vote through the vote commission. That group was used to encourage folks to participate. So blacks had various little groups across the state, and even there were women groups. In Montgomery they had one [39] of the groups, I'm told, called the Ten Times One is Ten Club. That little group was encouraging folks to vote. But most black groups had some goals for civic participation. Now, how successful

they were, it varied depending on what county they were in and all of that.

Q. What do you mean by civic participation?

A. Register to vote. They were not – that was essentially the big thing at that time to get be a first-class citizen. In fact, the way blacks were considered to be a first-class citizen was to get registered to vote. If you were not registered to vote, you were not considered a first-class citizen in those days. And Rufus Lewis spent a lot of time going all over the county –

Q. Which county?

A. I'm sorry – all over Alabama to get people to register to vote.

Q. And, now, he was in the black teacher association as well, wasn't he?

A. No. Rufus Lewis was – he was a treasurer of [40] Ross and Clayton Funeral Home. He buried the dead. Rufus Lewis had been a coach at Alabama State University, a football coach, and he finally went and just took his own business, and he spent a lot of his time getting people registered to vote. For example, he was the director of transportation during the Montgomery Bus Boycott, and he just travelled all over Alabama trying to get people registered to vote. He would take a form – that form must have had three or four pages to it, and I guess we didn't realize that it was never intended for us to vote. We spent all of this time trying to get somebody trained and teach them how to pass this test that was not intended for you to pass, and you spent time on that only to – later on the person would deny you and say you just

missed a question, you didn't answer it right. And, of course, all of this pretty much prevailed until the Voting Rights Act of 1965. You had a little break in between, but not much. Blacks did not get any significant political [41] strength in this state until the Voting Rights Act was passed.

Q. Did the ADC operate on a statewide basis during its first decade of operation?

A. Within the first decade, yes. Our structure at one time, once, we were organized more or less on congressional districts. We went to – let me see if I can restate this. We would organize wherever we could. If somebody would agree to be a contact, that would be the contact. You know, self-anointed, self-appointed, didn't matter. We were just trying to get somebody to be a contact for the organization. And in nineteen – but our structure was there was so many seats on the executive board from congressional districts.

In 1970, I became chair. We changed that. We changed it to where our executive board would have one person for every county. At least a county chair of every organization would be on the executive board plus others. So in 1970 that's when we really went statewide in terms of getting [42] someone to act as chair. We would call up and ask somebody, look, will you be acting chair that we can hold an election, and so that's when we did that statewide in each county. So we finally got all the counties pretty much together.

Q. You were only 31 or 32 years old in 1970 when you were first elected chair of the ADC?

A. Yes.

Q. Why you? How did they pick you?

A. Because I was – had been executive secretary of the black teachers association since 1964. I travelled statewide. And one of things that the black leaders wanted to do, they wanted to get an identification with the teachers because many folks thought that the teachers were not involved enough in the political arena. And I had been in the Sit-In Movement –

Q. When you were a student at Alabama State?

A. At Alabama Sate [sic] I was in the Sit-Ins, and I had been student body president at Alabama State, so – and be in the – I had also [43] gained some recognition when Governor Wallace – right after the Selma-to-Montgomery March, we had identified with the teachers, we had identified with the whole Civil Rights Movement, and that was – the Alabama State Teachers Association was one of the first teacher organizations to identify with the Civil Rights Movement, I mean, officially.

Dr. King had spoken before the – at the convention of the Alabama State Teachers Association when the teachers were in Selma trying to get the right to vote. We had backed them and identified with them, had gone to Washington to try to get help for them. We had entered the era what we call – what I call massive litigation in behalf of our members. So the organization had taken on a totally different philosophy, and I think time brought that about.

So in 1970 we were meeting at the Whitley Hotel here in Montgomery –

Q. We being?

A. The Alabama Democratic Conference. Several of [44] the fellows came to me, Arthur Shores and Gomillion, Q.D. Adams, and some of the founders. Somehow they – for some reason they thought that my identification with the teachers association, I think, would help the organization because I travelled a lot, and the organization didn't have any money. So they asked would I serve as chair of the ADC, and I told them, yes, and if they would help me; only if they would help me would I serve as chair. If you help me, I'll do it. And they said they would help me try to build it, and we set out to bring some changes to it, and we did that. We also –

Q. Before you – before you –

A. Yeah.

Q. Tell us also about the incident in which you had stood up to Governor Wallace that had caused you to gain some notoriety among the black political leaders?

A. Oh, yes. In 19, what, 65 after Mrs. Liuzzo was killed, the Selma-to-Montgomery March, Governor Wallace invited the National Press to [45] come to Alabama. And his point was you come to Alabama and look at Alabama yourself. Of course, he had argued that everything – everybody was happy and things were all right and only the outside agitators were causing the problem. So he invited, as I said, the National Press and provided two Trailways busses [sic] to carry them over Alabama. They went to Selma, they went all over the state, and they ended up at Lawson State Community College now. It was called Winona then. Governor Wallace had helped

sponsor, I think, under the Wallace-Cater Act, some act that he sponsored in the legislature to help establish trade schools. He always was very proud of – of Winona, at that time was the name of the school. But what he did, he – being Governor Wallace –

Q. That was a black school?

A. Yes – invited the college presidents to respond to the questions from the National Press. And I was serving as Executive Secretary of the Alabama State Teachers [46] Association. I will call that ASTA from now on. If I say ASTA, that's the same thing, ASTA. So when we got to Lawson State, formerly Winona, one of the reporters asked Dr. Morrison, R.D. Morrison, who was president of Alabama A&M University – Morrison was there, Dr. Levi Washington was there; Smiley was there, president of Trenholm Technical College, two or three others were there, black educators who served as presidents of the various schools. But the question was put: Dr. Morrison, Governor George Wallace said that black people in Alabama are happy and that if the outside agitators would leave them alone, they would be all right. Do you agree with George Wallace on that question, and also what do you think of George Wallace. This was 1965, a very loaded question, one that I never thought Morrison could handle, should have handled. I always thought it was unfair to even invite them all up there.

Q. Why?

A. I thought that was a case where they was [47] intimidating.

Q. How?

A. But putting before the court of public opinion on one hand and the political power structure in Alabama on the other. Blacks had no power at that point.

Q. Who controlled their jobs?

A. The state board of education, and George – and Governor Wallace was chair of the state board.

So I told them, I said, no, don't – Dr. Morrison, don't you answer that question, let me answer that question. Keep in mind I did not work for the State of Alabama. I worked for black teachers of Alabama. And I went on to respond that blacks had been kept in subjugation, blacks had been discriminated against, blacks had been denied the right to vote, and that it was not the National Press – it wasn't the outside agitators that was causing the problem. It was the inside agitators. And I just turned it into a personal press conference. And the [48] papers carried a lot of it that next day. That was the point in my time, I think, that I, because I was very young at that time, became accepted as a spokesperson for black – for black issues pertaining to education and politics.

So after that – that's 1965, and, of course, the Voting Rights Act was passed. Then in nineteen – well, I've already talked about the 1966.

Q. Let's go [sic] your election in 1970 as state chair.

A. Yeah.

Q. Is there any more you want to tell us about that event?

A. Well, I think that what helped influence is the role we had played also in Chicago in 1968.

Q. We being?

A. We being Alvin Holmes and I. What happened at that time, John Cashin had formed this group call the NDPA, the National Democratic Party of Alabama, and he had challenged the regular [49] delegation.

(Brief interruption.)

A. He had formed this – this third party. I had been invited to participate in the third party, and I elected not to because history had thought [sic] me that no third party had survived long. But at any rate, in 1968 in Chicago we were challenged, the regular delegation –

Q. That was the democratic –

A. The regular democratic party of Alabama. Bob Vance was chair. Our seats was challenged because Cashin had said through the national party leaders that this party was a Wallace party and that it would not have any allegiance to the nominee, and, of course, we fought back the challenge.

Q. We being?

A. Those of us who made up the regular delegation of the party. Bob Vance was our chair.

Q. How many blacks were in that regular delegation?

A. Well, the first two blacks – Arthur Shores [50] and I were the first blacks to be elected as delegates to the democratic convention in the century, and Bob Vance had arranged that. He arranged it, because at that time delegates were elected by congressional districts, and Bob – after I qualified for delegate, some other person qualified,

if I remember that right – don't hold me to this now – Mr. Bamberg had qualified.

Q. Red Bamberg?

A. I believe so, qualified for it. And Bob got him to – got him to resign. He resigned because he was going to have to take an oath to support the national ticket. That was a time when Dan Alexander wouldn't sign an oath that he was going to take the national – he was going to support the national ticket and later on repudiated the oath in Chicago.

But to answer your question precisely –

Q. Dan Alexander, for the Record – I don't know what – Dan was a law school classmate of mine. He was from Mobile County and was – [51] what at that time did he hold?

MR. MONTIEL: I'm going to object to the form of the question.

A. Okay. I'll just tell you what he was. He was a lawyer in Mobile who had gotten to be a delegate, and he came to Chicago. And in order for one to get his or her credentials, they had to pledge loyalty to the party; that they were going to support the nominee of the party. Dan Alexander sign [sic] a loyalty oath that he would support the party. No sooner that than [sic] he got his credentials, he went out and repudiated his position, had a press conference he was going to support George Wallace. That's what really happened.

Subsequent to that, several of the Alabamians left the convention, and they were filled in with some blacks and some whites to serve as delegates, but the official two

delegates who left here going to Chicago in 1968 were Arthur Shores and I was one of them.

So on the heels of that, on [52] the – you got to keep in mind this is during the era of massive resistance on the part of Governor Wallace's school desegregation. Harold Howe who was the commissioner of education that was putting guidelines on desegregating public education – a three-judge court had – in the case of Lee versus Macon had issued this statewide desegregation order desegregating public education throughout Alabama. George Wallace was running for national office as president. You got – you still got the Poor People's Campaign that Martin King had started; you got the death of Martin King coming in this era; you got the death of Bobby Kennedy around this same time. So, you know, you got – there's a whole lot going on in this state and then nationwide. And Governor Wallace was calling the legislation a special session to try to, quote, nullify the federal action. I remember testifying in the legislature against some of Governor Wallace's proposals, the only person in Alabama who testified against it, at least [53] the only black who just took it head-on and called it what it was. So all of these things are developing at this time. This is between 1965 and 1970. So '70, I had become known at least, for lack of the better word the loyal opposition, so I was – when I asked to serve as chair of ADC, that's what – that's the atmosphere the time had brought with this.

Q. Okay. Now, you've already described changing from a congressional district structure to a county level –

A. Yeah.

Q. – organization. When you took over as chairman, how many counties were you organized in?

A. We were probably organized in maybe ten.

Q. Okay. And how many counties are you organized in today, ADC?

A. About 60. And we have – and we have contacts in the other counties. Take a county like Winston County. You don't have any blacks in Winston County, so we used to have a contact in Winston County. For example, in Marion [54] County, we had contact there. For example, we used to use the black principals, black educators to either identify somebody or be the contact for us in various counties.

Q. How quickly were you able to grow your county chapters?

A. Well, I guess it took – I'm thinking it took us probably four or five years or six years to get – get them functioning.

Q. Was there a paid staff for ADC when you took over as chairman?

A. At first it was not a paid staff, no.

Q. When did you start with the paid staff?

A. Just a minute. Probably '72 or something like '72, a secretary first, and then later on we got a field director.

Q. Is that Jerome Gray?

A. Yes.

Q. He came on as field director. Well, he's already testified what year it was, but do you remember what –

A. He would know the exact dates, yeah. Whatever date he said, I accept that.

[55] Q. All right.

A. Alvin also served as field director some too, but he was part time.

Q. Alvin Holmes?

A. Yeah.

Q. Okay. To what extent were you successful in organizing black voters to support your leadership in the ADC?

A. We were very successful. For one we had – I said earlier we had the teachers association, which was – was kind of a built-in following. We had – I guess I had been student body president at Alabama State University, which at that time many of the black teachers and students knew me from that. We also had the yearning on the part of blacks to get involved and take advantage of the Voting Rights Act. So oftentimes, we had participation from some counties before we had them fully organized.

Q. Was there any – were you acting on any tradition in the black community when they do get involved in political – the political [56] process to work through their organizations?

A. Yes. We had – what we – we often pressed for unity at the ballot box. We tried to say to the black voter of Alabama, you know, we are a minority, there's strength in numbers, and that we need to, quote, try to stick together. And at that point we were – really weren't

pushing so much to get blacks elected. We were pushing to get respect from white political leaders.

For example, in 1970 one of the first things we did, we said nobody could be endorsed at our pre-primary convention. We were having our convention. We called it the pre-primary convention. And that was we had our convention prior to the democratic primary, and that – one of the things that we required was that in order to get endorsed, you had to come before the organization and ask the organization for its support, and that was in an effort to get respect.

Q. You're talking about the screening committees?

A. The screening committees. The screening [57] committees. And some folks were scared to come, and some didn't come; some did come. But we had a standing policy that if you didn't come, you couldn't get endorsed. That was started in 1970, and it really grew out of a discussion we had in 1966.

We were in Birmingham one evening arguing over what candidate we were going to support in 1966, and –

Q. That was a gubernatorial year?

A. Yeah. And it struck me that we were all arguing about who we were going to support, and no candidate was there. And I remember – you know, I was younger than most of them. I said, what the hell are we doing arguing over these folks; nobody's here to tell us anything, we are arguing over which one we're going to support. I said, let's not support any of them. Well, that didn't prevail at that time. But here we were there, bless our hearts, still learning, debating over Candidate A as

opposed to Candidate B, and neither one of them had enough respect for us [58] to come and ask for our support. When I became chairman, I said, no, that's not going to happen any more. So in 1970, we interviewed all the candidates. We were for Albert Brewer. We went to his office and interviewed him. We were trying to defeat Brewer over Wallace, and we went to the capitol to interview Albert Brewer. But the others who came came before the ADC at the Whitley Hotel.

So – and then the one that stands out to me is the one that Senator John Sparkman, 1972 as I recall it, we sent out our letter asking the candidates – notifying them of the Alabama Democratic Conference Convention. So I'll say 1970 – don't hold me to that date. I don't have my facts mixed up, but my dates may be a little off – I got a call from Senator John Sparkman, and he said, Joe, this is John Sparkman, I got your letter asking me to come to your meeting and, of course, I just can't come; I got to go to Oklahoma. Tell Arthur and all the guys that I [59] really want to be with them, but I can't, and – but I'll be thinking about them and sure counting on you for your support. I said, Senator, you must don't want our support. He said, oh, yes, I got to – I got to have it in order to win. I believe that was the year he was running against Melba Teel [sic]-Allen. I said, well, Senator, we have a rule now that unless you come before our organization, we can't support you. Well, now, when did that happen? I said, recently, we passed that rule not too long ago. He said, oh, I didn't know that. Few days – I mean, a few hours later, Joe, this is John Sparkman; I've checked that thing out in Oklahoma; I just told those folks I got to go

home. He came on, we interviewed him, and we supported him. But the point I'm making is that we were trying – in those days was trying to get the mere respect.

There was another one involving Jim Allen. Jim Allen really didn't need the black vote to get elected in Alabama [60] in those days, but he didn't like going to Washington where 25 percent to 30 percent of your constituents are against you, so he spoke to Bob Vance about that, that he wanted – really wanted to try to get our help. So we had a screening, and Jim Allen came before our screening committee. Peter Hall presided. I told Peter Hall – Peter Hall was the vice chair of ADC for a long time, Judge Peter Hall. So I told Peter Hall, I said, Pete, Senator Allen is coming. I said, now, be sure that the guys treat him with respect, but work him over; be sure you treat him with respect. And Senator Allen got in and made his pitch, and one fellow in the back said, Senator, here you are asking black people to support you, he said, how many blacks do you have on your staff. He didn't have any. But he said, well, I've talked to Dr. Morrison at Alabama A&M, President of Alabama A&M University; I spoke to Dr. Foster, President of Tuskegee University; I spoke to Dr. Levi Washington, President of Alabama State University, and [61] asked them if they could find some young bright black I would employ. The gentleman told him, said, Senator, said, we like Dr. Morrison, we like Dr. Washington, we like Dr. Foster, but you're not before them asking for their vote; you're before this organization, the Alabama Democratic Conference, so if you got a position to fill, the Alabama Democratic Conference is going to have to fill it. I was told that that was Jim Allen's – one of his best lessons in politics, and who told me that,

Jim Allen himself. So the Alabama Democratic Conference has been about also getting blacks involved, not only in just getting people elected, but also to get whites to employ blacks in various ways.

MR. BLACKSHER: Why don't we take a short, five-minute break here. You could use one, and I think the court reporter could use one.

(Brief recess.)

Q. Dr. Reed, would you summarize briefly – I [62] mean, we don't have enough time to go into all the detail I might like – but summarize for us what success ADC has had since you've been chair endorsing successful white candidates, let say, at the state and federal level?

A. Well, we were – as I said earlier one of the first things we sought to do was to get white political leaders in Alabama to respect the black vote by appearing before black people asking them for their support. That was done at our pre-primary convention, which is an annual convention of the Alabama Democratic Conference. We were instrumental in helping Bill Baxley to win the attorney general position of Alabama. We were instrumental in helping numerous other statewide candidates over the years. We were very decisive in helping Senator Heflin when he ran against Walter Flowers for the Senate to succeed Senator John Sparkman. We also were successful in Jim Folsom races, Public Service Commission, when he first ran and several elections thereafter. We were successful in [63] carrying Alabama for President Jimmy Carter when he ran for president. We were successful in – I guess many races. I just can't name all of them. But

throughout the ages since 1970 we've been extremely successful in –

Q. Did you ever play a role in helping Governor Wallace get elected?

A. I don't know whether we did or not. In nineteen – last time Governor Wallace ran, he ran against Albert Brewer – I'm sorry. I'm sorry – George McMillian, George McMillian. We supported George McMillian in the primary, and Governor Wallace defeated him. In the general election, Governor Wallace was facing Mayor Emory Folmar, the republican nominee. The question that we had before us was whether we were going to leave the party, and we said, no, we wasn't going to leave the party; that we would support all the democrats on the tickets because you had a lot of black legislators on that and a lot of white friends of ours too as democrats.

That's what it really came [64] down to. It was never a question to really endorse Governor Wallace. It was a question of whether we would leave the party or not, and we said we were not going to leave the party because it was nothing to leave it for because Emory Folmar offered no more than we thought Wallace offered. And so we decided to stay with the party, and we supported the entire slate with the party. It was never a case of formally endorsing Governor Wallace. Q. So based on your endorsement –

A. All the democrats – all the democrats carried.

Q. Who did the black voters support, and to what extent did black voters follow the endorsement is the question?

A. Oh, they followed it overwhelmingly. I would say probably 80 percent – 70, 80 percent voted straight democratic ticket, straight 80 percent straight democratic ticket or more.

Q. What about the Walter Mondale Jesse Jackson democratic primary?

A. Yeah. That was a very interesting election. [65] Walter Mondale had declared he was going to – was a candidate. Some of us had met with him and – really long before Jesse got into the race, frankly. And Mondale and Jesse was in the primary in Alabama. Several of us met and talked about it. I favored Jesse being vice president on the ticket; to support Jesse for vice president and Mondale for president. And the organization supported Mondale. It was a very close election. It was about – I think it was about 48 to 51 or something like that.

Q. Senator Sanders testified yesterday that it caused quite a commotion at that ADC convention?

A. It did. It did. It caused a big commotion. We met in Mobile at the Hilton Hotel and that the – our organization has what it calls kind of a standard endorsement. The candidate has got to be acceptable and electable. The ADC had encouraged Mondale to run, those of us in the hierarchy, and we kept our word to him. It did cause a big commotion. A lot of blacks were upset about it. More of the younger [66] blacks were upset than the older blacks, but it was – caused quite a bit of turmoil in that.

Q. Well, in those circumstances in that democratic primary, Jackson and Mondale, to what extent did the black voters of Alabama follow your endorsement?

A. About – probably the lowest we've had is probably about 48 percent.

Q. Lowest, you mean by county or over statewide?

A. Statewide about 48 percent supported Mondale and Jackson about 52. Now, Mondale carried Alabama –

Q. Okay.

A. – in Alabama. Because they supported him, he carried Alabama.

Q. When you said lowest you ever had, what do you mean by that?

A. I said lowest – that's the lowest time we've endorsed a candidate that – where we got probably less than 50 percent of the support.

Q. Okay. Were there any other black political organizations endorsing presidential nominees [67] in Alabama at that time?

A. To my knowledge, no.

Q. This was before the New South Coalition was formed according to Sanders' testimony yesterday?

A. Yes. Yeah.

Q. What about white legislators? As early as 1974, were any white legislators elected to the Alabama Legislature with the help of ADC's endorsement?

A. Yes. Montgomery County elected white legislators. We helped elect white legislators throughout the state, because at that time we were putting out a statewide ballot, and we were electing whites almost everywhere – helping elect whites throughout the state,

Mobile, even in places in the Black Belt, some few instances, places in other parts of the state, Walker County. Just all [74] over the state we were endorsing candidates and electing them because people would wait on the yellow ballot to be distributed, and they followed the yellow ballot to the T. Not only were they doing ti in the legislator race, we were doing it in the statewide races.

Q. You mean with respect to white candidates?

A. White candidates, yes. In fact, we had on the supreme court –

Q. Of Alabama?

A. – of – in Alabama. So throughout the state we were electing people and making the difference in our races, because to a large extent, the democratic party was tantamount to election to a large extent.

Q. At that time anyway?

A. Yes, at that time.

Q. Can you say if that's still the case today?

A. No, that's not the case today.

Q. Well, to what extent today do white democrats depend on ADC's endorsement in statewide elections?

A. They depend on it almost a life-blood because [75] the data will show that blacks are still voting 90 percent, 95 percent for the democratic party. I guess the most – last election that I did a major study on was – was the Guy Hunt, Paul Hubert [sic] election because somebody had erroneously put some figures out –

Q. That was the gubernatorial election of what year?

MR. BLACKSHER: Anybody want to help?

MR. MONTIEL: 1990.

THE WITNESS: 1990?

MR. MONTIEL: Wasn't that?

A. Okay – put the figure out that Guy Hunt had gotten 20 percent of the black vote, and there was just no way. We checked all the black boxes –

Q. I'm sorry. Who said that?

A. Natalie Davis had put out a report on that.

Q. Who is Natalie Davis?

A. Natalie Davis is a professor at Birmingham Southern.

[76] MR. WALKER: Birmingham Southern.

A. And she had – she also does polling. And she had made that remark, and it just wasn't the case. And we checked black boxes throughout Alabama, Mobile, Montgomery Wards, the Carver High School box, where it's only black voters, Atmore. We could go all over the state, and our records show that he got about – he may have gotten 3 percent.

Q. Hunt?

A. Yes.

Q. Of the black vote?

A. Yeah.

Q. Is that a regular activity that you conduct of analyzing election returns to see the extent to which black voters follow your endorsement?

A. We do it often, but we don't do it after every election. When I say that, we do not do a thorough analysis, but we do it by looking at the boxes. And the evidence is very clear that blacks are just – support our position anywhere from 80 percent in the primary to 95 percent in the general election.

[77] Q. Can you describe how the endorsements that you've been talking about and black voters in support of your endorsement has provided you influence in the Alabama Legislature?

A. Yes. One thing political leaders understand – that's two things. They understand money and votes. They understand that. That's – they understand that very carefully. And because we have – the Alabama Democratic Conference have unified the black vote, political leaders who seek office come to us and request our support, and we have a procedure by which they may or may not get that support.

Q. That's the screening committee procedure you were alluding to earlier?

A. Yes. Yes.

Q. Okay. We've had a description of that by Jerome Gray –

A. Okay. All right.

Q. – so you don't have to go through the details of that.

A. Okay. We – once you get your friends in [78] office, they will tend to listen to you more than they do if they – if you're not their friend. I mean, that's just common sense. You don't look to your enemies for support; you look to your friends.

Q. Okay. Is your mission and your purpose as -in ADC to try to exclude white people?

A. Not – no. Our purpose is to try to elect as many blacks as we can to public office and as many whites who will be sympathetic to our views. There are more white officeholders in Alabama than there are black. We have supported more white officeholders. We try to support officeholders who are sympathetic to our views, who are sensitive to our needs. In fact, we started off supporting whites long before we supported blacks, and we are one of the few organizations that have supported some whites against some blacks.

And so the Alabama Democratic Conference has a – our purpose and goal is to work to try to make things better for all Alabamians in general – Alabamians in general and black folks in particular. We exist for that purpose.

Q. Okay. What role did ADC play in – or did the ADC have a litigation agenda that was designed [85] to increase the opportunities for blacks to get elected in local elections in Alabama?

A. Yes. That was – what we set out to do in 1970 was to try to get blacks in every chamber of government

in Alabama, not to take over, but get equity; not tokenism, but equity. That was our goal. And that's consistent with our statement earlier that we want to get as many blacks as we can in the public because there are many whites who will cooperate. Because, you know, blacks are a minority in Alabama, so in order for blacks to successfully carry out its political agenda, it's got to have some whites who are sympathetic or sensitive to our needs. You know, you can have a minority of blacks, but unless you got some whites to go with them, you can't pass anything. On the other hand, black children, black citizens, and black political leaders got every right and an obligation to seek and hold public office and to fight for that, and I don't apologize for having to work for whites to get in office and [86] to work for blacks to get in office. I don't apologize for being a democrat. And when I can help, I help. And so the ADC has been about trying to change politics in Alabama, and I think to a large extent we did. I think the ADC was responsible for getting the white supremacy off the ballot where the rooster was on the fence crowing white supremacy. We finally stopped him from crowing white supremacy and more recently replaced him with a donkey. The rooster is no longer the emblem of the party. The donkey is the emblem of the party.

Q. Of the Alabama Democratic Party?

A. Of the Alabama Democratic Party. ADC has always had a donkey for its emblem. When the democratic party had the rooster, we had a donkey for our emblem.

Q. A kicking donkey?

A. Yes. So – but overall, the Alabama Democratic Conference played a tremendous role at all levels of government in influencing the outcome because black voters supported our [87] position. White political leaders and black political leaders come to the ADC basically for one reason, and that was there was some votes that they wanted that we could influence; otherwise, the organization would not have been around since 1960.

Q. Well, let me – before you start talking about that – specifics, why did ADC through our leadership consider it important to get involved in the post-1980 legislative redistricting?

A. Well, for several reasons. One, we wanted to get involved so we could get more blacks elected, get involved so we could get more democrats elected, we wanted to get involved so we could get people sympathetic to education, we got involved so we wanted to help influence the process. I've – the – so there was several reasons for trying to get involved.

Q. And what does redistricting have to do with those objectives?

A. Those objectives particularly they are in education. Most of the monies provided for education in Alabama is provided through state legislature.

Q. My question is, what difference does [90] redistricting make to your ability to do this?

A. I'm sorry. I'm sorry. Over the years, blacks have been – black votes have been diluted, and blacks – the seats that blacks were occupying were there by a court

order from the 1970 election. This is 1980, and we were there in part so that we could get a legislature that would be more sensitive, more friendly to all the people of Alabama and give Alabama leaders – Alabama people, rather, equity and give blacks an equitably fair voice in the legislature. So we got involved in that plan because we detected efforts in the legislature to minimize black voting strength in the legislature, and also – so there was – that's in 1980 coming off the heels of the plan that the court had ordered in 1973.

Q. Okay. Dr. Reed, when we broke I was beginning a series of questions about the 1993 redistricting effort. When did you first get involved in that?

A. Basically, because of the success we had in the 1980 plan, several folk, black legislators in particular had asked that I get involved in the 1991 plan. There was some white legislators too. Of course, the 1983 plan that we – in which we participated was the first plan in the history of the state that had been – that passed the legislature, precleared by justice, and sanctioned by the federal court, so – and one of the things that we were getting ready for, you've got to understand the climate at which we were [95] operating. We're trying to get a plan passed by the Alabama Legislature, so the three things that we had in mind when we would talk to legislators was the blacks certainly wanted me to be the chief negotiator, chief representative for them. Even though there were some other plans advanced, there was also a committee – a joint committee on legislative reapportionment that had looked at some plans, and there was just several different plans out there. I don't remember exactly how many, but it was several. So we set out to draw a plan

that would satisfy basically three things; that would be racially fair, that was – that protected incumbents, and aided democrats. And we said to them that we would talk to them as we went along about what they wanted in the plans and what they didn't want in it, because, again, you've got to try to pass a plan that was – that the legislature would buy.

Q. Who is them?

A. The legislators. Pass a plan that the [96] legislators would support. And there were many legislators who provided input into the plan, and whatever they wanted, we tried to give it to them, because if they didn't vote for it – one of the things that we would always ask them, you know, if we put this in, are you going to vote for the plan. And most said, yes, they would. So we set out to put a plan together based on those three premises. And after we got it drafted, we had a press conference, and we laid it on the table, what we call a commenting period. Here it is, draft one.

Q. Who had the press conference?

A. I did. And told everybody what – what was there and laid it on the table for, I guess, a couple of weeks for commenting periods.

Q. What table did you lay it on?

A. It was in the reapportionment office, told them they could go to the reapportionment office.

Q. Well, explain for the Record a little bit how a person, say a legislator, could go to the – [97] what is the reapportionment office like, and how does the legislator look at a plan over there?

A. The reapportionment office had a staff there, by the – a legislative staff, by the way, and that – they could – they being the legislators, could go by the reapportionment office, look at their maps, and see how their districts was shaped and see whether – as I call it, whether they wanted Sugar Hill in it or Harper Valley, you know, various communities. I used to call it the Sugar Hill Harper Valley Community. It didn't bother me if some legislator wanted Sugar Hill, somebody wanted Harper Valley. If they wanted to change it, we'd change it, because, again, we were trying to get a plan that would pass the legislature, get votes. And one could go by the legislative reapportionment office, talk to the staff, and they could call it to my attention and make some adjustments. In many cases we did make adjustments in the districts during the commenting period. We also had [98] maps. They could look at the maps, and the maps were in color. They could look at the maps and see if that was what they wanted. So that's the way we –

Q. What happened after the commenting period?

A. After the commenting period, we made the adjustments we could make, and the bill was put before the House of Representatives, and then it was voted upon. But the commenting period lasted a couple of weeks, or it might have been a little longer than that.

Q. How did the vote come out?

A. I don't remember, but it was overwhelming. It passed by a good margin.

Q. In the House?

A. In the House, yeah.

Q. But it didn't pass the Senate?

A. No, it did not pass the Senate.

Q. What happened in the Senate?

A. It was killed in the Senate. Ryan DeGraffenried was a – well, he was presiding – he was speaker pro – not speaker pro tem.

[99] Q. He was president?

A. President pro tem, yeah, and he killed it.

Q. Okay. And I assume that the president of pro tem has some special leverage to kill bills that he doesn't like?

A. The president pro tem can kill approximately anything he wants to kill unless the lieutenant governor tells him not to kill it, and sometimes he can kill it still, but . . .

Q. What was Mr. DeGraffenried's objection to the plan, if you know?

A. I'm not sure Ryan ever said other than he didn't like the plan, something to that effect.

Q. Did he make any requests for adjustments that you refused to make?

A. No, huh-uh.

Q. So you're telling me that you don't know exactly what his –

A. Right.

Q. So was there – and there was no other bill – reapportionment bill that did pass both houses?

[100] A. No.

Q. Was there any other bill that passed even one house?

A. I'm not sure, because there was a big – seemed like there was a squabble between the Senate and the House where they were saying that you pass mine first – you pass the House plan first or – and we'll pass the Senate and you pass the House. Seems like to me there was something that got involved in that, but I'd have to go back and reflect my – recheck my memory on that, exactly what transpired, but there was no plan that passed both houses.

Q. Are you suggesting that there might have been one that passed the Senate, but not the House, if you remember?

A. I just don't recall offhand.

Q. Okay. All right. Well, after no plan passed both houses, what did you do then?

A. Well, we were in court, filed an action in court.

Q. You're talking about the Sinkfield versus Bennett?

[101] A. Sinkfield versus Bennett.

Q. Versus Camp, I guess it was, at that time?

A. Yeah. Yeah. And an effort was made then to try to get it – get it accepted.

Q. What I need you to do is to tell me about the – the effort that was made and how you negotiated a settlement of that suit?

A. Oh, at that point, it was very clear that the plan that had passed the House had a lot of sentiment in the House for it based on the vote that was taken. Then I spoke to the Speaker of the House about it and asked that he try to see if we could – might get it settled. He called the attorney general and told the attorney general that – said that the plan that we had drafted, it had had a lot of input from the House members, it had been fair to practically everybody, and that he thought we ought to go on and try to get it settled. And the attorney general, who was Attorney General Jimmy Evans –

Q. And the Speaker the House?

A. And the Speaker of the House.

[102] Q. Was?

A. Jimmy Clark. And the attorney general said he would do what he could and file the necessary motions in court, papers in – motions in court. And, of course, that was done, and the plan was ultimately settled after the court provided fairness hearing, I believe, and let it lay on the table for a while.

Q. Was Evans elected to the office of attorney general as a democrat?

A. Yes.

Q. Was Clark elected to the – to his house district as a democrat?

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, JR., et al.

vs.

HAL SMITH, JAMES BENNETT, et al.

DARRYL SINKFIELD, et al.

CIVIL ACTION
97-A-715-E
Montgomery, Alabama
January 18-25, 2000

* * *

TESTIMONY ON JANUARY 19, 2000
OF CURTIS TRAVIS

* * *

[425] Q. Let me just understand a little bit more about the contest between ADC and New South in Tuscaloosa.

Now, you have been an ADC member throughout your [426] political career?

A. Yes.

Q. You the New South Coalition is strong politically in Tuscaloosa. Is that right?

A. Yes.

Q. Are most primaries in Tuscaloosa contested between those two organizations? Do they back different candidates generally in the Democratic primary?

A. Yes.

Q. And you testified –

A. Well, not all the time. Typically.

Q. Often. You all win some, New South wins some. Is that right?

A. Well, I will say we win most of them.

Q. But you all didn't win Senator Steele or Bryan Melton's districts?

A. We never contested Bryan Melton district.

Q. Senate Steele's election to senate district 24 was a Democratic primary between the New South Coalition and ADC. Is that right?

A. At that time, yes.

Q. Sally Cook was ADC?

A. Right.

Q. Can you tell the Court of any occasion within Tuscaloosa County, to your knowledge, where a black candidate has run for [427] election and did not receive the endorsement of the New South and ADC so that you can tell the Court that the endorsement was a factor in the election? Otherwise it would be a non-endorsed black candidate, that you are aware of?

A. Yes.

Q. Who was that?

A. Well, let's see. I was fixing to say . . . I was thinking the race for circuit judge with Sue Thompson and Hershey Hamner.

Q. Mr. Hamner is black or white?

A. He is white.

Q. And you all did not endorse the black candidate there?

A. No.

Q. Can you tell the Court the differences between the New South coalition and the Alabama Democrat Conference, you choosing to be a member of ADC?

A. Well, at the time when I first started out there in Tuscaloosa right before I took in, the people were members of both organizations. Time came where there was some changes made from the . . . more from the ADC standpoint, you know, that were we were not allowed to be participants in both political organizations. So, we had, basically, the people who used to be ADC some years ago, went with the New South and then there are some other people, such as myself and former county commissioner Joe Malisham who stayed with the ADC group there [428] in Tuscaloosa.

Q. Is it fair to say the New South coalition and the ADC endorse different candidates, often, in elections whether they and white or black?

A. Yes. Because that came about, the Alabama New South Coalition they endorse Republican candidates where the ADC does not.

Q. New South Coalition permits that type of endorsement?

A. Right.

Q. Is ADC referred to as part of the Alabama Democrat party. Is that my understanding of it?

A. I think some folks . . . I always say Alabama Democrat Conference. Some people want to say it's a black wing of the Democrat party, but it's not. Because, from my understanding, it has always been my perception that New South coalition is also a part of the Alabama Democratic party. And I am also a member of state Democratic executive committee.

* * *

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* * *

TESTIMONY ON JANUARY 25, 2000
OF GLEN McCORD

* * *

[5] Q. What . . . Have you ever run for public office?

A. Yes, sir. I ran in 1998 for the house of representative district 69 seat. And previously to that I was on the board of education in Wilcox County.

Q. How long did you serve on the board of education?

A. Two years.

Q. And I assume you ran against Mr. Thomas for that house seat?

A. Yes, sir.

Q. Have you affiliated most of this time with either ADC or New South?

A. ADC. Yes, sir.

Q. And is it active in the Lowndes County area?

A. Yes, sir.

Q. Is it . . . Between the New South Coalition and the Alabama [6] Democratic Conference, are those the two predominate black political organizations in that area?

A. Yes, sir.

Q. Would you give us your estimate of the persuasive power, the degree that ADC and New South are able to marshal votes and lead the black community in politics in that area?

A. Most of reputable people that I know are members of those organizations.

Q. So, are you aware of any candidate who has been successful to have local office without the endorsement of at least one of those two organizations?

A. No, sir I am not.

* * *

IN THE UNITED STATES DISTRICT COURT
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* * *

TESTIMONY ON JANUARY 25, 2000
OF BRYANT MELTON

* * *

[85] Q. Okay. Now, do you know Sally Cook?

A. Yes.

Q. And who is she?

A. She is a retired social studies teacher from Holt and the Tuscaloosa County school system. She was president of AEA.

Q. And she is a rival to your political group, isn't she?

A. Well, in 1993 ADC and New South were commingled. In 1993 they were not really opponents as far as Tuscaloosa area politics.

Q. Let me be clear. The two organization . . . You are a member of New South coalition?

A. Yes.

Q. And always have been, haven't you?

A. Yes.

Q. And then the competing organization in certain primaries is the Alabama Democratic Conference that Doctor Reed heads. Is that correct?

A. That is right.

Q. Now, you not are saying that those organizations merged into one organization during 1993, are you?

A. No. I am not saying that. But from the all . . . From the time that New South was organized up until the mid '90's, ADC and New South in Tuscaloosa supported pretty much the same [86] candidate within the county.

Q. Well, didn't you all run different people in the Democratic primary for senate district 24 in 1994, Representative Melton?

A. That's right. It did happen.

Q. And the organizations remain separate?

A. Yes.

Q. When you say you all merged. It's not a merger –

A. It wasn't a merger. But prior to, like, for example, 1994, would have been a test. But prior to that time most of the candidates within the county were supported by both ADC and New South.

Q. The senator that ran for the Democrat primary that you supported was a New South candidate by the name of Charles Steele?

A. That's right.

Q. He is the senator in senate district 24?

A. Yes.

Q. His opponent in the race in the Democratic primary was a lady by the name of the Sally Cook. Is that right?

A. That's right.

Q. Are you familiar with the old state school board districts within Tuscaloosa under to [sic] Reed plan that were drawn?

A. No.

Q. And . . . Let's go to another area. And you are not [87] suggesting that you were encouraging a competitive primary between the ADC and New South coalition, were you?

A. No. When Sally Cook's name surfaced there was not a candidate. No other candidate that we knew of had plan [sic] to run. Charles and several others got in the race after Sally had qualified.

Q. In fact, at the time the Reed-Buskey plan was prepared you were considering running for the seat?

A. Right.

* * *

[95] Q. Would you consider yourself a moderate in that you work well with the Republicans and Democrats in the legislature?

A. Fairly well.

Q. And you have friends that you are able to put together legislation on both sides of the aisle, don't you?

A. Yes.

Q. Was that one of the reasons you chose to become a member of New South Coalition and pull away from ADC in the early '80's?

A. No, that didn't have anything to do with that.

Q. This is an independent area of the state, Tuscaloosa, from the ADC, isn't it?

A. Pretty much.

Q. It's a New South Coalition stronghold?

A. At the present time. But at one time we worked real closely with ADC. But it has changed some over the last three or four or five years.

Q. You know Lucius Black?

A. Yes.

Q. Now, Lucius Black ran as a . . . He is a black member of the legislature?

A. That's right.

[96] Q. And from what district, if you know? Do you know what it is under the 1983 plan?

A. If I could see the area I could tell.

Q. What city is it?

A. It's pretty much Utah, Sumter County area.

Q. Is that Greene, Sumter County?

A. Right.

Q. So, would that be old 1983 house district 67? This is the 1983 plan. Was he in this district?

A. Yes.

Q. And is he now . . . Is he part of the same nested senate seats you are in; senate district 24?

A. Yes.

Q. And that would be under the Reed-Buskey plan, house district 71. Is that correct?

A. That is right.

Q. And do you recall in 1982 when the Court ordered a special election to occur in 1983? Do you remember that period?

A. I remember.

Q. And do you remember Representative Black running as an independent and not as a Democrat or Republican and being elected to office as an independent; as a black person running for office as an independent?

A. Yes.

Q. And that was because the endorsements in Democratic party [97] had been controlled basically by the ADC in those areas. Is that right?

A. I don't know.

* * *

IN THE UNITED STATES DISTRICT COURT
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CIVIL ACTION
97-A-715-E
Montgomery,
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January 18-25, 2000

* * *

TESTIMONY ON JANUARY 20, 2000
OF WENDELL MITCHELL

DIRECT EXAMINATION

BY MR. PARK:

* * *

[645] Q. You mentioned that your current senate district 30 includes all of Autauga, part of Elmore, part of Lowndes, part of Butler . . . or all of Butler, all of Crenshaw, all of Pike and then part of Dale County. Is that right?

A. That's correct.

Q. Do you know how senate district 30 got configured?

A. I had no input, except one day in the hall . . . I mean, having heard all the testimony. This is the best I can share with you.

In the hall Joe Reed stopped me. He was not looking for me, I was not looking for him. But he stays up there a lot and we ran into each other. And he asked me if I had any preferences about my senate district. And I told him that I would like to have Autauga County in my district because they have been awfully good to me. I mean, you can understand that, having gotten votes I have gotten there all these years, that I am very fond of serving them and, apparently, they liked me. Now, that was a very short, stand-up conversation.

Two or three weeks later . . . Several days later. It have [sic] been weeks later, I ran into him again and he had a map that had Autauga County in the proposed district. And he asked me if I was satisfied with that and I told him I was. But both conversations . . . neither one was more than three minutes long. And that's the only input I had into that plan.

Q. Did the inclusion of Autauga County in senate district 30 have anything to do with race?

A. I don't know anything about that. I don't know anything about how this plan was drawn. I was not in on any of the preparation of the plan. I was interested in protecting my interests where I knew I could do the best politically.

* * *

IN THE SUPREME COURT OF ALABAMA

JOHN RICE and **CAMILLA L. RICE,**	)	
Appellants,	)	**Case No. 1970449**
v.	)	
DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN McKINNON, and **ANDREW HAYDEN,** on behalf of themselves and others similarly situated,	)	
and	)	
JIM BENNETT, in his official capacity as Secretary of State of Alabama,	)	
Appellees.	)	

ON APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY CASE NO. CV-93-689-PR

BRIEF OF APPELLEE JAMES BENNETT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF ALABAMA

BILL PRYOR (PRYOO2)
ATTORNEY GENERAL
BY:

John J. Park, Jr. (PAR041)
Assistant Attorney General
Stanley E. Graham (GRA071)
Assistant Attorney General
Charles E. Grainger, Jr.
Assistant Attorney General

* * *

ARGUMENT

I.

THE TRIAL COURT'S JUDGMENT SHOULD BE VACATED AND THIS CASE DISMISSED AS MOOT.

In this appeal, the Rices challenge the lines of legislative districts that are up for election in 1998. The cycle for that election has been underway for some time, and the primary election is set for June 2, 1998. Moreover, candidate qualifying closes on April 3, 1998. This case cannot be decided in time for any changes to be implemented in time for the 1998 elections.

Moreover, the legislative districts throughout the state are due to be changed after the 2000 Census results are in. The 1998 elections are the last time these district lines will be used. Any discussion of the constitutionality of those lines, which cannot be changed in time for the 1998 election and will not be used again, is academic.

Thus, this appeal and the underlying case are moot. the issues are likewise not capable of repetition. In such a case, the Circuit Court's judgment should be vacated and the case dismissed. *See Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1071 (1997); *Gross v. QMS, Inc.*, 669 So. 2d 839, 840 (Ala. 1995); *Masonry Arts, Inc. v. Mobile County Commission*, 628 So. 2d 334 (Ala. 1993).

Accordingly, the Circuit Court's judgment should be vacated and the case dismissed as moot.

II. WHETHER THE CIRCUIT COURT PROPERLY DENIED THE RICES' CLAIMS OF UNCONSTITUTIONAL RACIAL GERRYMANDERING AND UNCONSTITUTIONAL VOTE DILUTION

The Rices contend that the Circuit Court erred when it held that the Reed-Buskey Plan did not violate their constitutional rights. In particular, the Rices contend that they are the victims of unconstitutional racial gerrymandering and vote dilution. Bennett disagrees with these contentions.

The Circuit Court properly denied the Rices' claims. First, the Rices are guilty of laches so the injunctive relief they sought is not appropriate. Second, their claims were properly denied on the merits.

A. The Rices Are Not Entitled to Relief Because They Are Guilty of Laches

Notwithstanding the Circuit Court's denial of Bennett's motions for judgment in his favor on this basis, the clock continues to tick. Cf. *Aldridge v. Valley Steel Constr., Inc.*, 603 So. 2d 981, 983-84 n. 1 (Ala. 1992) ("Valley may offer in support of its judgment any argument supported by the record, whether that argument was ignored by the circuit court or rejected.") It is now impossible for this Court to grant relief that can be effected in time for the 1998 elections. This Court should reverse the Circuit Court's judgment and remand this case to the Circuit

Court with instructions to dismiss the Rices' lawsuit and vacate its November 20, 1997 Order.

1. The McKee Ruling

Subsequent to the filing of the Rices' lawsuit, other parties challenged the Alabama Congressional redistricting plan in a case styled *McKee v. James, Civil* Action No. 97-C-2078-W, in the United States District Court for the Northern District of Alabama, Western Division. Pursuant to the Voting Rights Act, a three-judge court was convened. In *McKee*, Bennett and the other State Defendants raised the same laches argument that was raised in this case as one of their defenses. On March 23, 1998, at 1:47 p.m., the parties in *McKee* stipulated to the dismissal of the action agreeing, *inter alia*, that it was inherently impractical to try to modify the Congressional redistricting plan before the 2000 Census. *See* Attachment A. This Stipulation resolved the case.

Later the same afternoon, however, at 3:39 p.m., the three-judge court filed an Order in which it denied the McKee Plaintiffs' claims with respect to the 1998 elections on the ground that they were guilty of laches. *See* Attachment B. The court observed that the earliest date at which it could enter an injunction was early June. "That could cause enormous difficulty to the state in getting ballots printed and distributed and otherwise discharging its election duties." *Id.* at 6. For that reason and others, the court entered summary judgment in favor of Bennett and the other State Defendants with respect to the 1998 election.

This case is in the same posture. For the reasons set forth in section A.2 below, no relief is possible before the candidate qualifying deadline on April 3, 1998, and relief before the June 2 primary is unlikely. To implement relief in this case would require a remedy hearing and preclearance. The Department of Justice gives itself sixty (60) days to respond to a request for preclearance, and approval is not guaranteed. *See* 28 C.F.R. § 51.9. In sum, the federal court's ruling in *McKee*, albeit *dicta*, should be persuasive in this case.

2. The Rices' Claims Are Barred by Laches

The Rices stated that the genesis of their complaint in intervention is the Circuit Court's 1993 decision in *Sinkfield v. Camp*, and the resulting state legislative districting plan. They premised their claim that the existing legislative plan created by the *Sinkfield* decree is unconstitutional on United States Supreme Court decisions rendered subsequent to the Circuit Court's judgment. The holdings on which the Rices rely were, however, clearly prefigured in *Shaw v. Reno*, 113 S.Ct. 2816 (1993). Despite the fact that the *Sinkfield* and *Shaw v. Reno* decisions were issued in 1993, the Rices waited until August of 1997, four years later, to attempt to challenge the existing legislative district lines in this action. Quite simply, the Rices slept on their rights in the four years that passed since the *Sinkfield* and *Shaw* decisions and waited until just months before the 1998 legislative election cycle began to assert their claims. Their delay in challenging the existing plan is to the great detriment of Bennett and the voting public at large. Consequently, the Rices' claims are due to be

barred by the equitable doctrine of laches. The doctrine of laches is an equitable one that may be invoked to deny equitable relief "to one guilty of unconscionable delay in asserting a claim." *Stone v. Gulf American Fire & Casualty Co.*, 554 So. 2d 346, 362 (Ala. 1989). However,

> [l]aches cannot be founded simply on a lapse of time; to bar an action, laches requires either delay with notice of the existence of a right that results in a disadvantage to another, or delay which effects a change in circumstances such that the controversy can no longer be determined with reasonable accuracy.

Jones v. Braggs, 637 So. 2d 1356, 1359 (Ala. Civ. App. 1994), citing *Davis v. Thomaston*, 420 So. 2d 82 (Ala. 1982). Delay and prejudice work in a "complementary" fashion. *Marshall v. Meadows*, 921 F. Supp. 1490, 1494 (E.D. Va. 1996). Thus, a party asserting the defense of laches will be:

> "aided by the inference of prejudice warranted by the plaintiff's delay. The plaintiff is then to be heard to excuse his apparent laggardness and to prove facts manifesting an absence of actual prejudice." *Giddens [v. Isbrandtsen Co.*, 355 F. 2d 125 (4th Cir. 1966)] at 128. Clearly the greater the delay, the less prejudice required to show laches, and vice versa. But the defendant is ultimately required to prove prejudice (given the defendant's burden to plead and prove laches under Fed. R. Civ. P. 8(c)) and "may either rest on the inference alone or introduce additional evidence." *Id.*

White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990). Bennett did not rest on the inference of prejudice alone.

(A) The Rices' Delay Is Unexplained And Inexcusable

As noted above, the Rices waited for nearly four years and an election before bringing their federal and state court challenges to the redistricting plan. To the extent that the case law was not developed in 1993, it was certainly sufficiently well developed by June 1995 to support the Rices' claims. Nonetheless, they waited for two more years. Their delay is inexcusable.

More specifically,

- In *Shaw v. Reno*, 113 S.Ct. 2816 (1993), the United States Supreme Court held that a plaintiff may state a claim for relief under the Equal Protection Clause of the Fourteenth Amendment by alleging that a State "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Id.*, at 2832.
- In *United States v. Hays*, 115 S.Ct. 2431 (1995). the United States Supreme Court held that a voter who did not live in an allegedly racially gerrymandered district lacked standing to pursue an attack on the gerrymandered district.
- In *Miller v. Johnson*, 115 S.Ct. 2475 (1995), the United States Supreme Court applied the principles articulated in *Shaw* to the Georgia congressional redistricting plan. The Court "ma[de it] clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the geometry and makeup

nor required to make a threshold showing of bizarreness." *Id.* at 2488. Rather, the plaintiff "must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions, defined by actual shared interests, to racial considerations." *Id.*

- In *Shaw v. Hunt*, 116 S.Ct. 1894 (1996), the United States Supreme Court held that the North Carolina congressional redistricting plan violated the Equal Protection Clause. The Court applied its holding in *Miller* to the claims that had been found sufficient in *Shaw v. Reno*.

- *In Bush v. Vera*, 116 S.Ct. 1941 (1996), the United States Supreme Court affirmed a judgment holding the Texas congressional redistricting plan unconstitutional. A majority of the Court applied the strict scrutiny analysis articulated in *Miller*.

Without agreeing that these decisions entitle the Rices to relief, it is clear that they could have based their "bizarreness" claim on *Shaw v. Reno* in 1993. They could likewise have read the 1995 decision in *Miller v. Johnson* to determine what showing they needed to make to prevail. The 1995 decision in *Hays* told the Rices the permissible scope of their complaints, *i.e.*, they had standing to complain about the lines of the districts they live in and only those districts. The 1996 decisions, *Bush v. Vera* and *Shaw v. Hunt*, simply reflect the working-out of the principles articulated in *Shaw v. Reno* and *Miller v. Johnson*. Nothing required the Rices to wait until May 1997, on the brink of the 1998 election cycle.

Moreover, the delay is unexplained. The Rices offered no justification for having waited nearly a year after the most recent of the decisions they cited to file their federal lawsuit. *Bush v. Vera* and *Shaw v. Hunt* were decided on June 13, 1996, and the Rices' federal lawsuit was not filed until May 2, 1997. The case did not make it to state court until late August 1997. As noted above, the trend on which the Rices rely would have supported the theory of their complaint long before June 1996. Moreover, the Rices were not prepared to litigate a case of this nature: They had neither an expert nor a proposed plan.

Likewise, the Rices cannot identify a material change in circumstances or law which excuses their excessive delay in prosecuting their claims. Any claim of reliance on the legislature to address the problem lacks merit. The legislature's failure to act on reapportionment resulted in the state action in which Rices reluctantly intervened. Moreover, since *Shaw* was decided, the legislature has not introduced a single bill seeking legislative reapportionment which would cause the Rices to reasonably anticipate legislative reform. Nothing of the sort was pending in 1997 when they filed their federal lawsuit. They fail to point to any specific facts justifying any claim of reliance on the legislature.

Instead, waiting until the last days of the 1997 session of the Alabama legislature and the beginning of the 1998 election cycle to assert their claims, the Rices precluded legislative relief and prejudiced Bennett by forcing him to choose between a thorough and zealous defense and a rushed solution designed to re-stabilize the 1998 election cycle. That cycle has been underway since

June 2, 1997. Because the Rices were not vigilant in pursuing the opportunity presented to them since 1993, pressure was placed on the parties to litigate and the Circuit Court to decide complex legal, political, and demographic issues in order to bring certainty to the 1998 election process.

In *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990), the court validated the application of laches to election controversies in facts similar to these:

> Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant. *See Herman v. City of Chicago*, 870 F.2d 400, 401 (7th Cir. 1989). In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously. *See, e.g. Williams v. Rhodes*, 393 U.S. 23, 34-35, 89 S.Ct. 5, 12-13, 21 L.Ed.2d 24 (1968). As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made.

The Rices failed to proceed expeditiously.

(B) The Rices' Delay Is Prejudicial

The failure of the Rices to bring their claim expeditiously operates to the substantial prejudice of Bennett and the tax-paying public. If the Circuit Court or this Court orders reapportionment, there will be insufficient time to implement those changes in time for the June 2, 1998 primary. (Shanholtzer Affid., p. 3) In the first place, if a court-ordered plan were warranted and adopted, such a plan would require preclearance from the Justice

Department pursuant to Section 5 of the Voting Rights Act. (Shanholtzer Affid., p. 5) Preclearance is a time consuming process. Additionally, assuming preclearance was obtained of the court's plan, the Office of the Secretary of State would likely be responsible for contacting the probate judges and county commissions of the counties affected. The county commissions would then have the obligation to change the assignment of voter precincts, and perhaps the number and location of precincts, in each county. Ala. Code § 17-5A-5 (1975); (Shanholtzer Affid., p. 4) Upon completion of this process, the county commissions would be required to obtain preclearance of such changes by the U.S. Justice Department pursuant to Section 5 of the Voting Rights Act. (Shanholtzer Affid., p. 5) Section 17-5A-5(d) of the Alabama Code mandates that this process be complete at least three months before the election (in this case, by March 2, 1998). It is simply too late to do all that now.

In order to give the Justice Department sixty (60) days to preclear changes to the legislative districts in time for the 1998 elections, county commissions would have had to make the proposed changes, adopt a resolution containing the changes, prepare a preclearance packet for the Justice Department and cause that packet to be received by the U.S. Justice Department by December 31, 1997 (January 1st being a state and federal holiday). *See* Ala. Code § 17-5A-7 (1975). If the Justice Department acted within the 60 days allotted, this preclearance would have been obtained on the last day possible consistent with § 17-5A-5(d), Code. That is no longer possible.

If a violation were found and the Circuit Court found it necessary or appropriate to split existing precincts in

order to provide a remedy, the burden on county governments would have increased significantly. Without the benefit of a specific proposed solution from the Rices, in the form of a proposed plan or expert testimony, it was and is speculative, if not impossible, to gauge the full extent of the problem. The Rices have still not proposed any specific remedy for the alleged constitutional infirmity. At a minimum, splitting precincts would add the burden of reassigning voters to the new precincts. (Shanholtzer Affid., p. 4) This would significantly disrupt the State's current program to reduce voter fraud by removing the names of dead and relocated voters from the voters lists. *See* Ala. Code §§ 17-4-200 to-204 (1975). Additionally, if the splitting of precincts were to result in an excess of 600 registered voters in a single precinct for counties using voting machines, additional precincts and locations would have had to be established within the plans adopted by county commissions, resulting in substantial voter confusion. Ala. Code § 17-5A-4 (1975).

Another time factor in this action extends from the necessity of raising money to run effectively for public office. Given that candidates have been entitled to raise money since June 1997. members of the voting public have obviously already relied on existing district lines in making decisions whether to contribute to particular candidates. A change in district boundaries would have a direct effect on their interests in contributing to particular candidates for specific races. If district lines were ultimately redrafted, a contribution intended for a voter's particular district or district candidate could benefit a

new district of which the contributor may not be a registered voter, contrary to that voter's intent when making the contribution.

It is a common misconception that candidacy is established by qualifying as a candidate with a political party. In fact, the Fair Campaign Practices Act and the Alabama Ethics Act provide for candidacy to be established up to one year before the election. The Fair Campaign Practices Act has established a one year time frame in which candidates may raise money and therefore meet the thresholds for qualifying as candidates. Ala. Code § 17-22A-7 (1975) (effective October 1, 1997); and Ala. Code § 36-25-6 (1975) (effective through October 1, 1997). The Fair Campaign Practices Act and the Alabama Ethics Act establish monetary thresholds which, once raised by a candidate, establishes his or her candidacy pursuant to Alabama law. Ala. Code §§ 17-22A-2(1) and 36-25-1(3) (1975). Because the next primary election is to be held on June 2, 1998, candidates have already begun qualifying for election to the existing legislative districts. Each of the districts in Lee County, as well as adjoining districts, stands to be significantly impacted by the Rices' suit.

Additional examples of prejudice to the voting public likely to be caused by the Rices' excessive delay in asserting their claims included the possibilities that:

- Incumbents from two separate districts could have been moved to the same district and forced to run against one another.
- A citizen voter could have contributed to a candidate in his district, only to find himself reassigned to a different district altogether where the candidate is not running for office.

- A candidate could choose to run in his district, solicit contributions and expend resources, and then be moved to another district in which he might be unelectable due to the incumbency of another candidate or the demographics of the voters in the new district.

Clearly, the tardiness of this litigation injects considerable confusion and disruption into a process already under way, to the disadvantage of the contributing public and candidates. The Rices asked the Circuit Court and now ask this Court to make a mid-stream change to the election process in a narrow time frame caused by their slackness in the filing of this action. As the District Court explained in *Marshall*:

> Were this Court to strike the statute, permit the legislature to rework it, and have the Justice Department review it per the Voting Rights Act, various parties including Warner and his supporters would be forced into a frenzy of activity. That frenzy would have been avoided had plaintiffs filed suit when they first considered it. . . .

Id., 921 F. Supp. at 1494.

* * *

IN THE SUPREME COURT OF THE STATE OF ALABAMA
APPEAL NO. 1970449

JOHN RICE and CAMILLA L. RICE,

APPELLANTS

v.

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON AND ANDREW HAYDEN on behalf of themselves and others similarly situated,

AND

JIM BENNETT, in his official capacity as Secretary of State of Alabama.

APPELLEES,

ON APPEAL FROM THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA
CASE NO. CV-93-689-PR

REPLY BRIEF OF APPELLANTS JOHN RICE AND CAMILLA L. RICE

ORAL ARGUMENT REQUESTED

MARK G. MONTIEL
KATHLEEN A. BROWN
ATTORNEYS FOR APPELLANT
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* * *

of higher jurisdiction. The Rices have presented to this Court valid arguments that the current legislative districting scheme contains serious constitutional violations: it is ludicrous for the State appellees to suggest that this Court dismiss the appeal.

II. The State Appellees' Request That This Court Dismiss The Challenge To The Legislative Districts In Question As Being Moot Should Be Denied.

This issue is not moot as the State Appellees now suggest. First, the reasons relied upon by the State Appellees in their argument that this issue is now moot could have been presented by the State months ago, but were not. Nothing has changed but the passage of several months – a fact from which this issue is not rendered moot. Second, it cannot be said with any amount of certainty that there will not be any more elections held under the current districting scheme after the 1998 elections. The reason why the state appellees' argument must fail is that there is no guarantee that the legislature will properly redistrict itself after the 2000 census; thus, there is the possibility that the 2002 legislative elections will need to be conducted based on the districts at the time – districts put into place by the Reed-Buskey Plan. Further, at any time between now and the time when the results from the next decennial census are made available to the state for redistricting purposes, a special election may be required in any House or Senate district. As unfortunate as it is to discuss, the death of a legislator requires that a special election be held in the district represented by that

deceased legislator. It would be premature for this Court to accept the State Appellees' argument that this issue is now moot. The death of a legislator has already occurred once during the pendency of these proceedings when the late Thomas Reed passed away. It would be unreasonable to suggest that there is not a possibility that this scenario will present itself again in the future. Therefore, this issue is not moot as an election may be required in any one of the unconstitutional districts before the next redistricting plan is implemented.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,
Plaintiffs,

vs. CIVIL ACTION NO.
97-A-715-E

HAL SMITH, et al.,
Defendants.

* * * * * * * * * * * * * *

DEPOSITION OF PEGGY C. KELLY taken pursuant to stipulation and agreement before Patricia Starkie, Registered Professional Reporter, CM, and Commissioner for the State of Alabama at Large, at the offices of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama, on Thursday, September 23, 1999, commencing at approximately 9:45 a.m.

* * * * * * * * * * * * * *
* * *

[15] Q. Do you have any evidence that you were placed in Senate District 30 because of your race?

A. I feel that, but I have no evidence.

Q. Why do you feel that?

A. Because we're separated from everybody else. Our representative is in south Alabama.

Q. Do you have a problem with Senator Mitchell's representation of Autauga County?

A. I have no problem whatsoever with Senator Mitchell's representation, but I feel like that we need one of our own closer to us.

* * *

[42] Q. Can you tell us, exactly what do you claim is wrong with your house district?

A. There is nothing wrong with the house district.

Q. Satisfied with the house district?

A. Yes, I am.

* * *

[44] Q. And you are satisfied with 88?

A. Yes.

Q. And you're not asking – And I'm not trying to put words in your mouth. I just want to know.

A. No, I'm satisfied with 88.

Q. And you're not asking the Court to do anything with respect to 88?

A. Right.

* * *

[48] Q. All right. Other than distance and other than the little neck that put them together, do you have any other complaints about how your senatorial district is drawn?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,

Plaintiffs,

vs. CIVIL ACTION NO.
97-A-715-E

HAL SMITH, et al.,

Defendants.

* * * * * * * * * * * * * *

DEPOSITION OF BIBB GUNTER taken pursuant to stipulation and agreement before Patricia Starkie, Registered Professional Reporter, CM, and Commissioner for the State of Alabama at Large, at the offices of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama, on Friday, September 24, 1999, commencing at approximately 3:15 p.m.

* * * * * * * * * * * * * *
* * *

[22] Q. Do you contend that you were placed in House 86 because you're white?

A. I was already in 86 in some form or fashion before that was drawn up.

Q. Okay. Do you contend that you were in Senate 29 because – placed in Senate 29 because you're white?

A. I don't think so.

* * *

[28] Q. You can answer. Do you think it's okay to use the line between Henry and Houston counties as a line?

A. I think the south side of 86 is okay. When you get up into the Henry County, then you start getting, you know, pretty hairy up in here.

Q. And you're talking about what's marked as 85, right?

A. That's correct. That's what I said, the south side of 86 is okay. But when you start getting up in here in the part that you said was the borderline, getting up into Henry County, which includes Headland and Abbeville, in that area, it starts going like this (indicating).

* * *

[31] Q. Do you have any evidence or any understanding why it was done like that?

A. No, I don't. That's why I'm here today and that's why I've been asking the question, like I told you while ago, why is it drawn like that? Why would you draw a line like that, especially right in here? Why would you come in and do that? Most of the time when things of this nature are done on different projects, you use main arteries, like I said while ago, like the main arteries that come through districts. Why were these drawn like this?

* * *

[36] Q. Is that why you filed this lawsuit, is to get clarity?

A. Damn right. I want to know what the hell is going on. You got all this rigmarole here, and all of a sudden you drop way down here [37] in the city of Dothan and cut out a portion of a place as big as the city of Dothan, with 65,000 people, and you cut out this little piece of pie? That don't make sense.

* * *

[50] Q. So you would be in either 86 or 87 if the Court redrew the house districts, you think?

A. Yes. Have to be.

Q. Okay. You wouldn't be over in 85, would you?

A. No. I'd be in 86 or 87.

* * *

[55] Q. (Mr. Park continuing) Let me go back to Exhibit 13. Other than the inclusion of House District 85 in Senate District 29 –

Because you included 85, 86, and 87 in [56] 29, right?

A. That's correct.

Q. Other than including that, do you have any problems with Senate 29?

A. Other than including those three in that one – those three houses –

Q. Other than 85 – other than what – Let me rephrase my question.

Do you see any problems, other than any line that's attributable to House 85, with Senate 29?

A. Let me make sure.

MS. BROWN: I'm going to object to the form. You can answer.

A. I don't understand, really, the question. The lines the way they are now, do I object to anything other than that?

Q. Other than – the lines as they are now, the lines that –

And when you say that, you're pointing to the lines of House 85, right?

A. That's what you asked me.

Q. Okay. Other than those lines, do you have any objection to Senate 29?

A. I wouldn't have any objection. I mean, I'm here to object only to those lines.

Q. Okay. And, again, those are the lines of House 85 that go into Senate 29; is that right?

A. That's right. Which consist of 85, 86, and 87.

Q. Okay. And is it your contention that those lines of House 85 were drawn for racial reasons?

A. Yes.

* * *

[78] Q. Well, you know your representative, Joe Carothers, you've already said.

A. Yes, sir.

Q. Did you support him when he ran?

A. I voted for Joe, yes, sir.

Q. And so the candidate of your choice won out of your district?

A. Yes, sir.

Q. And what about this senator? Over the [79] years, Chip Bailey used to represent you, I believe; that is, in the – it would have been in the '94 election he won. Did you support him –

A. I voted – I did, I voted for Chip.

Q. And you were pleased he had won?

A. Yes, sir.

Q. And most recently, he was – I don't remember – I don't know the local politics. He was defeated by –

A. Harri Anne Smith.

Q. – Harri Anne Smith?

A. I voted for Harri Anne Smith.

Q. So your candidate won again?

A. That's right.

Q. So at least where you are voting, you have been able to elect candidates of your choice?

A. That's correct.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 97-A-715-E

HAL SMITH, et al.,

Defendants.

* * * * * * * * * * * * * *

DEPOSITION OF KAREN OUTLAW taken pursuant to stipulation and agreement before Patricia Starkie, Registered Professional Reporter, CM, and Commissioner for the State of Alabama at Large, at the offices of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama, on Wednesday, December 1, 1999, commencing at approximately 12:30 p.m.

* * * * * * * * * * * * * *

* * *

[18] Q. Okay. Do you know why Autauga County was linked to Pike and Crenshaw counties in the senate plan?

A. Well, I have my own assumptions.

Q. And what's your assumption?

A. From what I understand, that I think you needed a block of whites to put in with here. I believe it was – Joe Reed was one of the ones that helped work this out, and – I mean, there is no reason for Autauga County to be

involved with these [19] counties whatsoever. The only thing I can see is that maybe they wanted to grab a few more of the white race to put in with these to create a black district.

Q. And where was that black district it was creating?

A. Here in the District 23.

Q. And was Dr. Reed out to create a black district, majority black district, or out to create a majority white district in your opinion?

A. For what district? For District 30?

Q. What was he trying to do first?

MR. MONTIEL: I'm going to object to the form, but you can answer when I make those objections.

A. Okay. Well, they both go hand and hand. If he's looking for a majority black district, he has to take something away to add to a white district.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,

Plaintiffs,

vs.

HAL SMITH, et al.,

Defendants.

CIVIL ACTION
NO. 97-A-715-E

* * * * * * * * * * * * * *

DEPOSITION OF WILLIAM RICARDO MONTIEL, M.D. taken pursuant to stipulation and agreement before Patricia Starkie, Registered Professional Reporter, CM, and Commissioner for the State of Alabama at Large, in Room 173, The University of Alabama School of Law, 101 Paul Bryant Drive East, Tuscaloosa, Alabama, on Thursday, December 2, 1999, commencing at approximately 3:20 p.m.

* * * * * * * * * * * * * *

* * *

[7] Q. And who is your representative for 63?

A. You know, I don't pay attention to the representatives that much. I'm not sure. I [8] can't remember. I usually vote straight Republican ticket.

Q. Do you know whether he's doing a good job, bad job, indifferent job?

A. Not really.

Q. You don't have any complaints about his performance, do you?

A. Not that I know of.

* * *

[11] Q. Can you tell me what you mean by racially gerrymandered?

A. Well, my opinion about it is that it just appears that where I live and my district, the way it's drawn up, it just has an unusual look to it in my opinion. I mean, it doesn't include all of the city of Tuscaloosa. I think that's my primary complaint.

* * *

[22] Do you think that you've been put in your district because you're white?

A. I don't know why that district is the way – I saw a recent map. I'm not sure why it would be drawn that way. I don't know why I'm in that district.

Q. Okay. So you can't say you were put in it because you were white?

A. No, I can't say that.

Q. Okay. And do you know whether House District 62 is majority white or black?

A. I do not know.

Q. Do you know whether House District 70 is majority white or black?

A. I don't look at people that way. I don't know.

* * *

[30] Q. Okay. Do you think that house district – this portion of Hale County was placed in your senate district because of the race of the people there?

A. I wouldn't know why they would draw it that way.

Q. You can't say it was or wasn't?

A. I can't say it was or wasn't for that reason.

* * *

[32] Q. Do you have any knowledge about how those districts were drawn?

A. No, I couldn't specifically say how they were drawn.

Q. Do you have any evidence that race was a consideration in the drawing of them?

A. No, and that's not even a concern of mine.

* * *

[41] Dr. Montiel, have you read the complaint that's been filed in this action in your behalf?

A. No, I have not.

Q. Do you know whether or not you have alleged that the districts, the house and senate districts that you reside in violate the Constitution of the United States?

A. I don't know the specific legal aspect of it, no. My concern is the shape more than anything else.

* * *

[43] Q. And what is the evidence that has come to your attention that you believe makes your district a racial gerrymander?

A. I haven't seen the evidence. Primarily, my concern is the shape of the district in relation to where I live. I mean, there are people that aren't even – that are around the corner, around Central High School from me, and I'm not but a couple of blocks away, that aren't even in my district that would have something in common with me, I would think, whether they be black or white or anything else. I don't – I don't understand why it's written the way it's written. It should include Tuscaloosa.

* * *

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Equal Protection Clause of the Fourteenth Amendment:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall the State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.